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The University of Texas at Austin School of Law

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"GAP FILLING" BY ARBITRATORS

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ENERGY CENTER

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[The arbitral tribunal] proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to applied in such a situation . . [and] the conclusion is inescapable that [it] simply imposed its own conception of sound policy.[1]

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When I was first approached to talk on this topic---after of course the initial flush of pleasure at having been asked----there set in almost immediately a certain amount of uncertainty and indeed apprehension. I have in fact been trying---with incomplete success---to come to terms ever since with everything that lurks behind the announced title--and for that matter, with the entire subject matter.

I. The Notion of "Gaps"

For the notion of a "gap" is an evanescent one, one which can---and often does---mean everything and nothing.

- It could perhaps be said that the very notion of a "gap" is simply incoherent--- that the very concept of "silence" or "lack of agreement" is problematical and somewhat naïve---for once we are satisfied that the parties have entered into a "contract," there can by definition be *no "gaps."* Indeed, "by its legal definition a 'contract' *cannot be*

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This is a longer version of a presentation prepared for a panel at the 22nd ICCA [International Council for Commercial Arbitration] Congress, held in Miami on 6-9 April 2014.

[1] Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp., 130 S. Ct. 1758, 1769 (2010).

incomplete."[2] As Justice Breyer bluffly remarked, there is "no such answer" that a contract is "truly silent"---for if "it doesn't say, you try to figure [it] out."[3]

- Or perhaps it could be said that, by contrast, there are *nothing but "gaps*"---that unless the parties have taken the pains to construct an infinite agreement, mapping onto every conceivable state of the world, likely or unlikely, known or unknown---a contract that stretches out to track the real world as if in a story by Borges---then courts must be free to reconstruct or interpolate.[4] "If contracts had to be complete, there would be no contracts at all."[5] For example:

  - Where invitations for bids to supply equipment contain detailed specifications of the goods---and notes that certain manufacturers are "approved sources" or that the goods "may be purchased" from them---have the parties said anything at all---or have they simply been silent---on the subject of whether the goods must actually be manufactured by the named firms so that identical components are

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[2] That is, the existing contractual framework is necessarily all-encompassing, providing an answer to any question at all that may arise with respect to the rights of the parties: The Uniform Commercial Code, for example, defines "*contract*" as "the total legal obligation that results from the parties' agreement as determined by [the Code]," "*including all the gap fillers*." Omri Ben-Shahar, *"*Agreeing to Disagree": Filling Gaps in Deliberately Incomplete Contracts, 2004 WISC. L. REV. 389, 399 n. 25.

[3] The actual dialogue, a little less coherent given the constraints of oral argument, went like this:

> Mr. WAXMAN [counsel for the petitioners]: There is a separate statutory question that arises if the answer to the contract question is [that] there is no meeting of the minds. It is truly silent --
> JUSTICE BREYER: If there is no such answer---
> MR. WAXMAN: Excuse me?
> JUSTICE BREYER: I thought, in contracts, there is no such answer. When you interpret a contract and it doesn't say, you try to figure out -- I used to be taught that; probably I am way out-of-date---you try to figure out what a reasonable party would have intended.

Oral Argument, Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp., 2009 WL 4662509 at *5. Cf. id. at *17 (Justice Scalia: "I really don't understand what it means to say that the contract does not cover it . . . [I]f the contract is silent, either the court or the arbitrator has to decide, what is the consequence of that silence, in light of the background, in light of implied understandings.").

See also Charles Fried, Contract As Promise: A Theory of Contractual Obligation 69 (1981) ("There is no bare flesh showing, as it were, when relations between persons are not covered by contractual clothing. These relations take place under the general mantle of the law").

[4] "I once had a case in which the contract was 2000 pages long but did not cover the issue that the parties were litigating." Richard A. Posner, The Law and Economics of Contract Interpretation, 83 Tex. L. Rev. 1581, 1606 (2005).

[5] Daniel Markovits, Contract Law and Legal Methods 667 (2012)("to address every contingency precisely, would increase the costs of contracting so that they came to swamp whatever surplus the contractual exchange promised to generate"). See also Posner, supra n.4 at 1583 ("perfect foresight is infinitely costly," and "even in a setting of perfect foresight, . . . parties may rationally decide not to provide for a contingency, preferring to economize on negotiation costs by delegating completion of the contract to the courts should the contingency materialize").

excluded? If they failed to expressly address the issue, what are the consequences?[6]

- Where the parties have entered into a contract granting a licensee the right to produce television shows based on a series of children's books, is there a "gap" in the agreement---that is, have the parties failed to tell the decisionmaker whether or not the licensee is permitted to produce and distribute videos---even if this is a technology that was "not in existence at the times the rights were given"? Have they failed to address the question? [7]

- Where the parties have entered into a lease of rooms overlooking the planned route of a coronation procession, is there a "gap" in the agreement---that is, have the parties failed to tell the decisionmaker what to do---in the event that the King suddenly falls ill with an attack of appendicitis?[8] Have they failed to address the question?

- Where a father has made a support agreement for the benefit of his minor son, agreeing in 1937 to pay him $1200 per year "until [the son] enters "into some college, university or higher institution of learning," is there a "gap" in the agreement---have the parties failed to tell the decisionmaker what to do---in the case where the son finishes high school and is (since the country is at war) immediately inducted into the army?[9] If there is a "blind spot" here, have the parties failed to address it?

- Where the parties entered into a "requirements" agreement by which the buyer would buy "solely" from the seller all his "requirements" of propane for use in its fleet of trucks, is there a "gap" in the agreement---have the parties failed to tell the decisionmaker what to do---if the buyer suddenly decides not to order any propane from the seller at all because he has decided not to convert its fleet to propane?[10]

- Where an agreement lacks any dispute resolution clause, is there a "gap" in the agreement with respect to arbitration---that is, have the parties failed to tell us whether they are committed anyway to submit future disputes to an arbitral

[6] See WPC Enterprises, Inc. v. U.S., 323 F.2d 874, 879 (Ct. Claims 1964).
[7] See Rey v. Lafferty, 990 F.2d 1379 (1st Cir. 1993)("ambiguous phraseology [may] mask an absence of intent rather than a hidden intent which the court simply must 'find'"); see also Robert Hamilton, Alan Scott Rau, & Russell Weintraub, Cases and Materials on Contracts 365 (2nd ed. 1992)("the occurrence of unexpected events or changes in circumstances usually places great strain on language that was drafted with an entirely different (and often more modest) problem in mind").
[8] Krell v. Henry, [1903] 2 K.B. 740 (C.A.).
[9] Spaulding v. Morse, 76 N.E.2d 137 (1947)
[10] Empire Gas Corp. v. American Bakeries Co., 840 F.2d 1333 (7th Cir. 1988).

tribunal? Is this a matter that the parties have failed to address? And if so, may we be justified in concluding that despite their "silence," the "gap" should be filled with an arbitration clause?[11] And if the answer is "yes," would this be as a result of

- ✓ an exercise of contractual "interpretation" grounded in their likely intent?[12]
- ✓ the crafting of an alternative "default rule," grounded in the taken-for-granted nature of arbitration agreements in international transactions---a working presumption that would shift the burden to the objecting party to show that no such agreement exists?[13] Or by contrast, would it be

[11] Obviously we leave to one side here any requirements touching on the formal validity of such an agreement, a subject that has nothing to do with the problem of interpretation. See Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, ¶¶ 19-20 (the original art. 7 of the Law "was amended in 2006 to better conform to international contract practices"; two options are now open to enacting states, both of which permit arbitration agreements to be "entered into in any form (e.g., including orally)").

[12] Art. 2-207 of the Uniform Commercial Code is suggestive here. In the common 'battle of the forms" scenario, an offer may say nothing at all about arbitration---but the second form, which is assumed to be an "acceptance," contains an arbitration clause. The Code's contract-formation mechanism will lead to the conclusion that an arbitration agreement has nevertheless become part of the contract, at least where the arbitration clause is deemed not to be a "material alteration" of the offer. This question of "material alteration" will hinge on whether the clause will cause "unreasonable surprise" or "hardship" to the offeror---and that, in turn, will depend on whether arbitration would be outside the scope of usual "trade practice"; see, e.g., Alan Scott Rau et al., Processes of Dispute Resolution: The Role of Lawyers 677 (4th ed. 2006) ("the idea seems to be that a clause which is sufficiently important and unusual that a party would expect to have his attention specifically directed to it, should not come into the contract by way of a form that is by hypothesis commonly unread"); Aceros Prefabricados, S.A. v. TradeArbed, Inc., 282 F.3d 92, 102 (2d Cir. 2002) ("unrebutted evidence that arbitration is standard practice within the steel industry" "precludes" the buyer from demonstrating "surprise or hardship"; therefore the arbitration provisions in the seller's form became part of the contract); Oceanconnect.com, Inc. v. Chemoil Corp., 2008 WL 194360 at *4, *5 (S.D.Tex.) ("numerous cases reflect the frequent use of arbitration in maritime contracts"; this "evidence of trade usage and the parties' course of dealing defeats a claim of surprise" and thus of "material alteration").

Note that when this becomes a plausible reading, the inference of the offeror's actual consent to arbitration, even though never made explicit, seems irresistible.

[13] Cf. 1 Gary Born, International Commercial Arbitration 653 (2009)("because international arbitration is the natural and preferred means of resolving international business disputes," "there are very serious reasons to presume, as a general matter and absent contrary indications, that commercial parties are predisposed to enter into international arbitration agreements"). On whether as an empirical matter this suggestion should be treated as a "majoritarian default," *compare* Theodore Eisenberg & Geoffrey P. Miller, The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56* Depaul L. Rev. 335, 351-52 (2007) (studying contracts contained as exhibits to Form 8-K filings with the SEC; while arbitration clauses do indeed appear more frequently in international contracts than in domestic ones, nevertheless, "the international contracts, like the domestic contracts, contain a low absolute rate of arbitration clauses: only about 20% of international contracts contain them"), *with* Christopher Drahozal & Stephen J. Ware, Why Do Businesses Use (or Not Use) Arbitration Clauses*?*, 25 Ohio St. J. Disp. Resol. 433 (2010)(the contracts studied by Eisenberg and Miller are not "a reasonable sample of what sophisticated parties specify ex ante regarding arbitration";

- ✓ the creation of a wholly new substantive right?[14]

(And does it really matter?)

When we are working through problems like this in the context of arbitration, the difficulties become far more acute---for

- there are our ordinary concerns aimed at giving effect to *contractual intention*, if we can locate it, and these intertwine with

- our concerns aimed at giving effect to *the choice of private decisionmakers*---that is, at preserving the powers that the parties, and thus the state, have entrusted to them.

I think that with respect to each of these, the values of private autonomy should be mutually reinforcing, and thus should tend to lead us in precisely the same direction---but as the

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"regulations defining what contracts must be filed along with SEC filings effectively limit the Eisenberg and Miller sample to . . . unusual contracts unlikely to include arbitration clauses while excluding more typical contracts that are more likely to provide for arbitration").

See also Jack Graves, Court Litigation Over Arbitration Agreements: Is It Time for a New Default Rule?, 23 Amer. Rev. of Int'l Arb. 113 (2012) ("since "arbitration is almost certainly the normative method of resolving disputes in the majority of international commercial transactions," "this normative reality should be recognized through a default legal rule providing for arbitration in the absence of any agreement to the contrary"; "parties to a particular contract may be deemed to have impliedly consented to certain majoritarian normative terms").

Professor Graves goes on to add that in fact, "as a practical matter," U.S. courts "have already left consent far behind in deciding issues of arbitral jurisdiction"---pointing to the fact that "a party whose contractual consent is induced by fraud is deemed to have 'consented' to the arbitration clause within the main contract," Id. at 129. Now I have more or less abandoned, as futile, my longstanding practice of protesting common misunderstandings of *Prima Paint*--- but perhaps just this one last time? All right: The notion of "separability" *does not in the slightest degree* suggest that consent to an arbitration clause is "implied"; all it does is to simply leave the matter open for a discrete inquiry---allocating *to the arbitrator* the question of the validity of the overall agreement, *but reserving to the court the question of consent to the process*; see Alan Scott Rau, Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions, 14 Amer. Rev. Int'l Arb. 1 (2003)("under any sensible reading of *Prima Paint,* a person is only bound to arbitrate a dispute if he has agreed to do so," and "'agreement' here has no meaning that is in any way different from the use of the term every day in the realm of Contract"; the point is that the possible invalidity of the container contract "will frequently,' but "need not," affect the validity of the consent to arbitrate). See also Alan Scott Rau, Arbitral Jurisdiction and the Dimensions of "Consent," 24 Arb. Int'l 199, 200, 204-06 (2008)(despite "separability," the question of core consent "to arbitrate anything at all" is for the courts).

[14] Cf. Giles Cuniberti, Beyond Contract: The Case for Default Arbitration in International Commercial Disputes, 32 Fordham Int'l L.J. 417 (2009), who suggests that states could "amend their legislation in order to make arbitration available in the absence of any agreement on dispute resolution"; supposedly it is one virtue of this model that granting parties the right unilaterally to invoke arbitration, would cause arbitration to "lose its contractual foundation" altogether. But one consequence is that since the entire "contractual foundation of arbitration disappears," the proposed model "could not benefit from the New York Convention." Id. at 482. It is only at this point, as I have noted previously, that I begin to detect "considerable analytical confusion," Alan Scott Rau, Understanding (and Misunderstanding) "Primary Jurisdiction," 21 Amer. Rev. Int'l Arb. 161 fn. 294 (2010); bargaining in the presence of known default rules can hardly be deemed non-consensual.

epigraph to this paper suggests, not everyone sees it quite that way. Not long ago the U.S. Supreme Court, in reviewing an arbitration award, performed an elaborate riff on the significance of "silence" (which I take to be a related metaphor), in an attempt to identify the outer limits of arbitral authority in "gap filling"---and with a lack of success that was quite dizzying.

Here by contrast is my "take" on the subject. I fear that it will be seen right away that the approach I take is inescapably that of a common-law lawyer, and what is worse, one tainted by, and cabined within, all the Legal Realist attitudes of the 1930's and 1940's. I have struggled against this tendency---I have tried to be a philosopher---but you may notice how vain the struggle has been.[15]

II. Fatal "Gaps" and the Role of the Arbitrator

Now there may exist cases where "gaps" may be so extensive, or so critical, that the very notion of private autonomy loses any possible legitimacy. These are the true "gaps": Here there is a failure of agreement that may be fatal in the sense that---as in some low-budget horror film--- the cracks spread so widely as to swallow up any pretense of a contract.[16] Contracts students sometimes refer to such cases as exemplifying a lack of a "meeting of the minds"---but then have to be reminded that our "minds" are the least seemly thing that we should be talking about. The point is simply that in the event we should find it impossible to construct any story at all with respect to what the parties have agreed to---if there are inadequate manifestations of mutual assent---then neither has any right to impose duties on the other---and this may be true whether the lack of assent is caused by,

- a "draftsman's blind spot" hidden by unconscious assumptions (concentrating on one problem to the point that no attention is paid to other potential problems);

- an unsuspected latent ambiguity leaving the parties at cross purposes;[17]

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[15] Dr. Johnson was once reunited with a boyhood friend whom he had not seen in many years. "I have tried too in my time," said his friend, "to be a philosopher, but I don't know how, cheerfulness was always breaking in." James Boswell, 2 The Life of Samuel Johnson 212 (Everyman ed. 1992).

[16] Cf. *WPC Enterprises*, Inc., supra n. 6 ("there was no subjective coming-together, it is true, but an enforceable agreement came into being nevertheless"; "it is a normal characteristic" of this class of cases that the "gap has not been permitted to swallow the whole contract except perhaps where the gulf is far closer to the bounds of the entire consensual perimeter than here").

[17] See, e.g., Restatement of Contracts, Second, §20 ("There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and (a) neither party knows or has reason to know the meaning attached by the other; or (b) each party knows or each party has reason to know the meaning attached by the other.") . Or, perhaps, putting them in the position of the proverbial "ships that pass in the night," as in the classic case of *Raffles v. Wichelaus, (*1864] EWHC Exch J19 ("contract" called for the delivery of cotton "to arrive ex Peerless from Bombay," but neither party apparently realized that there were two ships of that name,. one departing in October and the other departing in December).

- a willingness to be content with amorphous, meaningless formulae expressive of nothing but a vague benevolent intention,[18]

- or, more troublingly, by a conscious preference to set aside remote but potentially troublesome contingencies in the hope that they will simply go away---or that if necessary, a court can be found to make the difficult choices that the parties themselves would rather avoid.[19]

These are all cases on the margins of contractual behavior, or indeed at its outer limits---and there are doubtless far fewer of such cases than there used to be. In any

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Endless variations: One is presented by a case like *WPC Enterprises*, Inc., supra n. 6: Here, the parties' different interpretations had in fact surfaced prior to contracting---but a higher-level misunderstanding occurred; "compounding that confusion, they discussed the issue with each other in such a way that each thought, but this time without good reason, it had obtained the other's acquiescence in its chosen reading. The impasse became unmistakably plain when it was too late."

And sometimes, by contrast, the parties may equally be at cross purposes when such "mutually-reinforced obscurity" is *absent*---that is, they may at all times remain painfully aware of their contradictory understandings of a contractual term. In such circumstances the Restatement seems to suggest that there is a lack of mutual assent and thus an absence of any enforceable contractual obligation. This was the fact pattern in *LCC v. Henry Boot & Sons,* [1959] 1 W.L.R. 1069) (H.L.): In a contract for the construction of apartment buildings, the question was presented whether an escalator clause calling for an increase in payments in the event of increases in the "rates of wages" included increases in the costs of "holiday stamps." The parties had entered into the contract "both perfectly aware of their opposing views on the subject," but the House of Lords bluffly rejected the assertion that on account of this difference of views "there was no consensus ad idem."

[18] See, e.g., Varney v. Ditmars, 111 N.E. 822 (1916)("if you boys will go on and continue the way you have been and get me out of this trouble and get these jobs started that were in the office three years, on the 1st of next January I will close my books and give you a fair share of my profits"; held, this is "not only uncertain, but [s] necessary affected by so many other facts that are in themselves indefinite and uncertain that the intention of the parties is pure conjecture"; "the courts cannot aid parties in such a case when they are unable or unwilling to agree upon the terms of their own proposed contract").

[19] See, e.g., Joseph Martin Jr. Delicatessen, Inc. v. Schumacher, 417 N.E.2d 541 (N.Y. 1981)("Tenant may renew this lease for an additional period of five years at annual rentals to be agreed upon"; held, tenant's action for specific performance dismissed; the renewal clause contains no "methodology for determining the rent," nor does it "invite recourse to an objective extrinsic event, condition, or standard on which the amount was made to depend"; "neither tenant nor landlord is bound to any formula").

I say these cases are "more troubling" because while courts are increasingly willing to enforce contracts despite the fact that material terms may have been left open, the fact that the *parties have expressly identified a possible hurdle to agreement* may suggest that they were unwilling to submit to a term supplied by some third party; cf. Markovits, supra n.5 at 702 ("it is one thing for the parties to a negotiation simply to leave a term out on their way to agreement, it is quite another for them to agree to postpone negotiations concerning a term and to proceed to other facets of their negotiations, subject to subsequent agreement on the postponed matter"); Ben-Shahar, supra n. 2 at 395 (with "agreements to agree" "it is not the materiality of the terms per se that prevents gap filling, but rather the fact that the parties explicitly identified them as the subject matter for further affirmative agreement," creating the possible inference that "they do not yet intend to be bound").

event a rather naive "contract/no contract" dichotomy is infinitely less interesting than two related points which are critical to our discussion:

1. As a doctrinal matter, in normal discourse, a challenge on any of these grounds, if taken seriously, would suggest that there simply "exists" "no agreement to which the parties could be bound"--or so commentators regularly tell us.[20] But despite the continuing cackle that gravely insists on the formalistic and conceptual distinction between notions of "existence" and of "validity"[21]---and despite ineradicable

[20] E.g.,. Marvin A. Chirelstein, Concepts and Case Analysis in the Law of Contracts 35 (3rd ed. 1998). Cf. G. Rau et al., Cours de Droit Civil Français [Aubry & Rau] 180 & fn. 3 (5th ed. 1897)(«We must not confuse transactions that are void [*nuls]* with those that are non-existent [*inexistants ou non avenus]. . .* If there are missing those factual elements that are presupposed by the very nature of the transaction---if it is logically impossible even to imagine the existence of the transaction in the absence of those elements- ---then we have a transaction that is not only void, but one that simply never existed. . . . So for example *one cannot conceive of a contract without the agreement of the parties, nor a sale without the goods sold or without a price* »).

[21] I have written that "ingenious riffs on the metaphysical distinction between contract 'invalidity' and contract 'nonexistence' have long been a stable of Continental legal learning." "Its tendency to take metaphor for reality, its personification of legal concepts, its characterization of doctrine in terms of what is 'unthinkable' or 'logically impossible'---all of this exemplifies the worst excesses of formalism." "Separability" in the United States Supreme Court, 2006:1 Stockholm Int'l Arb. Rev. 1, 18; see also id. at 19 ("the whole notion of 'nonexistence' is not only sterile and purely verbal---but what is worse, is completely unnecessary"). For examples, see Pieter Sanders, *L'autonomie de la clause compromissoire*, *in* Hommage à Frédéric Eisemann 31, 34-35 (1978) (one must distinguish between the "invalidity" [*nullité*] of the contract and the "complete absence [*inexistence*] of the contract"; "if there is no contract at all, any legal foundation for the powers of the arbitrators is equally lacking"); Eric Loquin, *Note* [to *Société Pia Investments v. Société L & B Cassia,* Cour de Cassation 1990], 1992 J. Droit Int'l (Clunet) 170, 173 ("the arbitration clause [can] have no existence when the contract, which contains it, [is] itself non-existent"; "it is difficult to see [sic] how the parties could have bound themselves to arbitrate over a contract to which they had never consented"); Sojuznefteexport v. Joc Oil Ltd. (Bermuda), 15 Y.B. Comm. Arb. 384, 406, 430 (1990) (Ct. of App. Bermuda 1989)("borrowing Prospero's language, was the sale contract the baseless fabric of a vision, insubstantial (i.e., non-existent) or was it in the more prosaic language of the law, something which mundane lawyers describe as an invalid contract?").

Happily, French jurisprudence and doctrine do seem in recent years to have retreated from such conceptualism. See Société Omenex v. Hugon, [2006] Rev. de l'Arb. 103, 105 (Cour de Cassation Oct. 25, 2005)(given the "autonomy" of the arbitration clause in international transactions, "neither the invalidity nor the inexistence of the container contract affect it"); Jean-Baptiste Racine, *Note,* id. at 106, 124 (a "turnaround" in the case law; it must now be considered a "given" [*acquise*] in French arbitration law that a claim alleging the non-existence of the main contract does not impair the jurisdiction of the arbitrator; "the non-existence of the main contract cannot automatically be thought to adversely affect the arbitration clause").

But then, curiously, we seem to find it resurfacing again, zombie-like, in the United States; see Restatement of the Law Third, The U.S. Law of International Commercial Arbitration § 4-12(d) & *cmt. d (*Preliminary Draft No. 5, Sept. 1, 2011), which lays down the rule that while "a court does not review the arbitral tribunal's determination of the *validity* of a contract that includes the arbitration agreement," nevertheless, "a court reviews de novo . . . the *existence* of the contract that includes the arbitration agreement." "Such challenges necessarily implicate a party's assent to arbitration, and hence a court has the final say." I must say that with all respect I strenuously disagree. It is just as facile to assume *a priori* that defects in the main agreement *must* vitiate the arbitration clause, as to assume that they *cannot*. In other words, "logic"—as usual—will take us precisely nowhere. See generally Rau, *"Separability,"* supra n. 13 at 38-45 *("void, schmoid*"). As the discussion

misunderstandings with respect to the implications of "separability"---such challenges *must not be taken to impair any contractual duty to arbitrate*---and so they should be entrusted *to the arbitrators themselves* for decision:

After all, parties who had repressed (or deferred consideration of) possible ambiguities, might still plausibly have gambled that should an ambiguity surface, they would be able to persuade the ultimate decisionmaker of the merits of their own interpretation---and might plausibly have preferred this decisionmaker to be an arbitrator. Contracting parties might have been willing to arbitrate---not only the existence of a breach of contract---but also whether the terms of the alleged contract *were too indefinite to give rise to a breach in the first place*. The only interesting question in any of these cases is the likely boundaries of contractual assent, and a claim that an enforceable agreement "was never concluded" need not prevent the inference that the parties would have wanted to entrust *that very question* to arbitrators chosen by them. In the words of Judge Easterbrook*, "if they have agreed on nothing else they have agreed to arbitrate."*[22]

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in the text and in the following footnote demonstrates, *it is simply not true that a claimed lack of contract formation must always, and by definition, include a claim that the resisting party also did not agree to the arbitration clause.*

[22] Sphere Drake Ins. Ltd. v. All American Ins. Co., 256 F.3d 587, 591-92 (7th Cir. 2001); Judge Easterbrook was referring there to Colfax Envelope Corp. v. Local No. 458-3M, Chicago Graphic Communications Int'l Union, 20 F.3d 750 (7th Cir. 1994)(Posner, J.). In *Colfax* an employer and a union disagreed over the meaning of the term "4C 60 inches Press-3 Men" in a collective bargaining agreement; the employer believed the language meant—in contrast to past practice—that only 3 men would be required to man any of its 78" wide four-color presses; the union interpreted the language to refer only to presses 60" *and under*. The employer sought a judicial declaration that no contract existed "because the parties never agreed on an essential term"; the union counterclaimed for an order to arbitrate. The court affirmed an order of summary judgment in favor of the union: "E*ven if" there was no "meeting of the minds" on the meaning of this critical term, at the least "there was a meeting of the minds on the mode of arbitrating disputes between the parties."*

Similarly, in Bratt Enterprises, Inc. v. Noble Int'l Ltd., 99 F.Supp.2d 874 (S.D. Ohio 2000), *rev'd on other grounds,* 338 F.3d 609 (6th Cir. 2003), the contract provided that the purchase price of certain assets would be adjusted following the closing as a result of certain later expenditures, and "due to the uncertainty associated with this post-Closing adjustment, the Parties included an arbitration clause in the Purchase Agreement to resolve any disputes associated with this adjustment." One party later asserted a defense of "mutual mistake" regarding the drafting of this portion of the agreement; nevertheless the court pointed out that there was no claim at all "that there was any 'mutual mistake' in the negotiation of the arbitration clause itself."

Precisely the same analysis is applicable in related cases of indefiniteness or "agreement to agree." See, e.g., Toray Industries Inc. v. Aquafil S.p.a., 17(10) INT'L ARB. REP. Oct. 2002 at D-1 (Sup. Ct. N.Y. 2002)(parties signed a document that one party contends "was no more than agreement to agree and that the parties intended to negotiate further"; held, "the parties have agreed to arbitrate"—the parties "actively negotiated the choice of law and arbitration clause," which was not "inadvertently slipped in"—and so the arbitrators "will determine all questions including the meaning, effect, validity or enforceability of all other contract terms"); Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469 (9th Cir. 1991)(in determining whether a "Memorandum of Intent" was a "binding contract for the purchase and sale of bananas, or merely an 'agreement to agree' at some later date," the trial court "improperly looked to the validity of the contract as a whole" and "ignored strong evidence in the record that both parties intended to be bound by the arbitration clause"; court should instead have "considered only the validity and scope of the arbitration clause itself"); W. Laurence Craig et al., International Chamber of

2. A separate point is that *whoever the appropriate decisionmaker may be*, such challenges are increasingly unlikely to succeed, particularly where the putative defect is one of uncertainty and indefiniteness.

   a. At bottom, when you come to think about it, there is really nothing particularly *recherché* in the practice of creating entirely new contract terms through adjudication: When it is alleged that a failure of agreement has caused a deal to be insufficiently defined to be enforceable as a contract, judges, let alone arbitrators, will already and frequently do precisely that. The fact that they will often do so covertly, under the guise of interpretation--as an increasingly preferred alternative to allowing the gap to "swallow up" everything that has in fact been settled on--in no way changes the principle.

      So despite the traditional wisdom familiar to every first-year student--to the effect that courts will not "make a contract for the parties" or enforce arrangements where they have merely "agreed to agree"[23]--we can see a growing judicial

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Commerce Arbitration 165 (3d ed. 2000) (discussing case in which a "contract would have been null under French law if the price had not been specifically fixed or determinable by objective reference," but arbitration clause was unaffected by the alleged nullity; the arbitrators then went on to determine that the contract was invalid because the price was indeterminate)

In light of all this, Judge Easterbrook's earlier opinion in Hill's Pet Nutrition, Inc. v. Fru-Con Construction Corp., 101 F.3d 63 (7th Cir. 1996) is puzzling and troubling. Here Fru-Con agreed to renovate and enlarge a pet food plant on a cost-plus basis, but the parties ultimately failed to agree on some fundamental issues, notably "how 'cost' would be defined". The district court concluded that the parties "never came to closure on all terms" of the agreement and they therefore "had not agreed on anything at all, precluding the possibility of arbitration." But the court of appeals did not agree, ruling instead that

- in circumstances where the parties have begun performance with some issues still be resolved, *they do have an agreement* that
- at least "includes *all of the terms that have been mutually approved."*

So, there was indeed *an agreement to arbitrate*. Nevertheless the lower court's refusal to compel arbitration was affirmed: The dispute over which the lawsuit had been filed "were the very items over which negotiations [had] collapsed"; since "these were issues left open at the bargaining table," "the arbitration clause, although part of the parties' agreement, does not come into play." I could certainly use some help understanding this---please:

- Given the premise of an enforceable agreement to arbitrate, isn't the question whether "a contract had been formed in the first place" properly one that falls to be decided by the *arbitrators themselves*?
- If the arbitrators find that some contract has been entered into, isn't it for them to determine the precise terms?
- What can it possibly mean as a practical matter to allocate decisionmaking responsibility by saying respectively that "some terms" are indeed subject to arbitration---"the portions of the draft master agreement on which the parties agreed"--- but that other terms---like those over which the negotiations happened to abort---are not arbitrable at all?
- Is the suggestion, then, that "*to the extent there has been a failure to agree,* the arbitrators are rendered impotent"---and if so, is this not an eerie precursor to *Stolt-Nielsen*?

[23] See, e.g., Joseph Martin, Jr. Delicatessen, Inc., supra n. 19 at 543 ("Before the power of law can be invoked to enforce a promise, it must be sufficiently certain and specific so that what was promised can be ascertained. Otherwise, a court, in intervening, would be imposing its own conception of what the parties should or might have

willingness to fill consensual gaps in an honest effort to uncover or even reconstruct the parties' original narrative.[24]

b. But the challenge is far less likely to succeed---the challenge is a fortiori going nowhere---where we can make this further step: Perhaps we can conclude that if any "gap" appears---however fatal it would otherwise be---the parties contemplated that the defective agreement could be salvaged---the missing terms filled in---by the arbitral tribunal itself.

Let's begin at the beginning: The traditional reluctance of courts to enforce inadequately specified agreements---their traditional recital of their inability to "make a contract for the parties"--- presumably serves certain functions and purposes, no? It certainly has to come from somewhere. An *a priori* assertion is not argument.[25] I think it must derive from policies like this: When courts continue to insist on a certain level of clarity and completeness in the terms of a contract, an economist would say that they are attempting to insure that the deal is "allocatively efficient"-- roughly, that it serves to reallocate resources to higher-valued uses--and that they do so by assuring that the deal has been bargained out by the parties themselves, in terms of their own assessments of their own interests. They may also be trying to

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undertaken, rather than confining itself to the implementation of a bargain to which they have mutually committed themselves").

[24] Compare Sun Printing & Publishing Ass'n v. Remington Paper & Power Co., 139 N.E. 470 (N.Y. 1923)--a wooden mainstay of the Contracts curriculum of a generation ago--with David Nassif Associates v. United States, 557 F.2d 249 (Ct. Cl. 1977). See also U.C.C. §§ 2-204(3), 2-305. *Joseph Martin*, supra n. 19, distinguished Sales cases decided both prior to and subsequent to the UCC on the grounds of "the more fluid sales setting in which [they] occurred"; by contrast, said the court, "stability is a hallmark of the law controlling" transactions in real estate.

Other legal cultures may in this respect be---if not indeed more adventuresome---at least more frank in openly acknowledging what they are doing. See, e.g., Sir Basil Markesinis et al., The German Law of Contract: A Comparative Treatise 59-60 (2nd ed. 2006)("the net of default rules is wider in German than it is in English law and one practical consequence of this is that the parties need not attempt to anticipate in the contractual drafts all eventualities"; even essential terms like price can be left to "be fixed at a later stage," and "the court is empowered to review the exercise of discretion of the contracting party . . . and if necessary replace it with its own determination"); see also id. at 140, 143 (the default rule of "good faith" "empower[s] the courts to imply into the contract a wide range of collateral obligations"; doing this work of implication "enabled the courts to transcend the actual intentions of the parties and imply terms, not which the parties would have included, but which they *should* have included in the contract")(emphasis in original); Stefan Kröll, *Contractual Gap-Filling by Arbitration Tribunals*, [1999] Int. Arb. L. R. 9, 13 (so "fixing of a price at the judge's discretion must therefore be considered as dispute-settlement in the German legal system").

[25] But see Pieter Sanders, Arbitration in Long-Term Business Transactions, *in* Proceedings, Vth International Arbitration Congress (New Delhi, 1975) at C.Ivb1, 2 ("courts are . . . nowhere, as far as I know, authorized to fill gaps and supplement the agreement of the parties by filling in . . . open spots," and "many (national) arbitration laws of the world are based on the principle that the power of the arbitrators cannot reach further than the power of the Courts"; to complete the syllogism, then, this is not "arbitration proper").

prevent parties from taking a "free ride" on the public court system by shifting onto the courts the burden of determining contract terms.[26]

But then, after all, none of these concerns applies with anything like their original force when the parties have chosen to entrust the power to fix terms to

- private decisionmakers--chosen by them, as their surrogates, with reference to their agents' training, background, experience, and presumed sensitivity to commercial realities;[27]

- and all this, of course, in a procedure for which they themselves have agreed to bear the costs.

In a sense then an arbitrator's decision, being itself an "instance of contractual gap-filling, just *is* a term of the parties' contract.*"*[28]

It is thus a familiar proposition that what might otherwise be a fatal "uncertainty" of terms can be cured simply by adding an arbitration clause.[29] When the parties

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[26] See generally Alan Scott Rau, The Culture of American Arbitration and the Lessons of ADR, 40 Tex. Int'l L.J. 449, 476-77 (2005).See also Posner, supra n. 4 at 1587 (interpolating a "reasonable term" is often rejected as too burdensome; "not only would the court incur the administrative cost of having to conduct an elaborate inquiry, but no matter how elaborate the inquiry, a substantial probability of error would remain, and an erroneous interpretation undermines the utility of contracting as a method of organizing economic activity").

[27] One might also suppose that arbitrators--often chosen precisely for their familiarity with the commercial context of a dispute--are likely to be somewhat more attuned to the dangers of one party's opportunistic behavior in the wake of the other's change of position, and more inclined to police it. Cf. Juliet P. Kostritsky, Taxonomy for Justifying Legal Intervention in an Imperfect World: What To Do When Parties Have Not Achieved Bargains or Have Drafted Incomplete Contracts, 2004 Wisc. L. Rev. 323, 364, 368, 377 (in the presence of uncertainty, sunk costs, and opportunism, "it becomes difficult to solve problems by contract ex ante," and parties may instead "turn to private ordering and alternative mechanisms of private 'governance structures' as the most efficient means of solving their problems and maximizing the gains from trade"; "[t]he presence of a comprehensive structure of nonlegal sanctions lessens the reason for court intervention").

[28] Markovits, supra n.5 at 1346. See also id. at 1347 (arbitration "does not so much contractualize adjudication as replace adjudication and the adjudicatory process with contract *tout court*"; it "is not a *process* for deciding the content of independent legal entitlements at all, but rather a part of the *substance* of the contracts that create it, a means of fixing the content of contractual rights"). [Professor Markovits focuses his discussion here on what he terms "first-party arbitration," a formulation that I believe is intended to capture the idea of, "arbitration without third-party effects"].

[29] See, e.g., Lafayette Place Assocs. v. Boston Redevelopment Auth., 694 N.E.2d 820, 826-27 (Mass. 1998) (although the contract left undetermined "exactly what [was] to be included" in the parcel of land being sold as well as the price, it also specified that "'appropriate details of the purchase and sale...shall be resolved be arbitration,"' and thus "created a means for resolving disputes that might arise in the course of effecting the ultimate sale"; "[t]o borrow Justice Holmes's metaphor, the machinery was built and had merely to be set in motion"); "); see also Leslie v. Leslie, 24 A. 319 (N.J. Ch. 1892). Disputes between the two owners of a close corporation "became so bitter and dangerous to its prosperity" that they wished to separate, with one of them retiring from all participation in the company's affairs. "But which should sell--who should go out--was the point of

agree to participate in this procedure, they may, even in commercial cases, be said to be taking part in a process that "involves not only the settlement of the particular dispute but also interstitial rule-making"--a process aimed at creating, refining, and elaborating for the future the rules which will govern their relationship.[30] At the same time, of course, such clauses---despite being labeled as "arbitration"---often exist precisely as a means of encouraging the parties' own voluntary efforts at renegotiation and readjustment. The right to invoke the arbitral process is there to make settlement more likely---as would indeed the right to force one's opponent into a game of Russian Roulette---that is, "as a spur toward a negotiated agreement," although inserted in the "fervent hope" that it will not ultimately be necessary to resort to it.[31]

One common setting in which this problem arises is where the apparent need arises to "adapt" the terms of ongoing contracts to new and unforeseen

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difficulty about which they could not agree." So they "were willing to leave the question as to which one should retire by the sale of his stock, and what the other should pay him for his stock, to be settled by arbitration." Id. at 321. (The court ultimately vacated the award, though, because it had purported to decide matters not submitted to the arbitrators, and because it was "uncertain and inconclusive").

The contrast suggested here is made abundantly explicit in a number of judicial decisions; e.g., Walker v. Keith, 382 S.W.2d 198, 199-200, 202, 204 (Ky. App. 1964) (lease provided that rental was to be fixed "as shall actually be agreed upon" by the parties and to be based on "comparative business conditions"; held, provision was too "indefinite and uncertain" to enforce; such provisions "have been the source of interminable litigation" and "courts sometimes must assert their right not to be imposed upon"; however, if the parties "had agreed upon a specific method of making the determination," such as the decision of an arbitrator, "they could be said to have agreed upon whatever rent figure emerged from utilization of the method). More recently, see 1651 North Collins Corp. v. Laboratory Corp. of America, 529 Fed. Appx. 628 (6th Cir. 2013)(option to renew lease at "the then market rent for similar space in the Louisville area, but not less than the immediately preceding five-year period"; held, the renewal option is not enforceable; the rental provision "is still too ambiguous to qualify as a definite objective standard"; the landlord "*could have solved this problem by submitting the question of what constituted a 'market rent' to arbitration, as the original lease agreement contemplates, but it did not do so").*

[30] Cf. David E. Feller, A General Theory of the Collective Bargaining Agreement, 61 Cal. L. Rev. 663, 744 (1973)(labor arbitration).

Here is something else, related, though not the principal subject of the present paper: How often do we see arbitrators "*create a new term of the contract"---even a term inconsistent with the original agreement*---once liability has been determined, and such action can be spun (or framed) as an *essential remedy* needed in order *to preserve the overall framework---the overall allocation of risks---implicit in the deal?* See, e.g., Timegate Studios, Inc. v. Southpeak Interactive, L.L.C., 713 F.3d 797 (5th Cir. 2013)(as a remedy for breach of contract and fraud committed by the publisher of a video game, the award provided that "the Publishing Agreement is hereby amended as a matter of law [so that the claimant has] a perpetual license for [the defendant's] intellectual property in the Game"; held, this was " a remedy that furthered the essence of the" agreement, and "was permissible and rationally explainable as a logical means of furthering the aims of the underlying publishing agreement"); Advanced Micro Devices, Inc. v. Intel Corp., 885 P.2d 994 (Cal. 1994)(arbitrator found that Intel had "breached the implied covenant of good faith and fair dealing" under a license agreement; AMD's actual damages were found to be "immeasurable," so the arbitrator gave AMD a permanent, royalty-free license to any of Intel's intellectual property that was embodied in AMD's competing chip).

[31] See Lon Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 406-07 (1978)(in "complex long-term supply contracts," "obligations to negotiate under the threat of an exercise of adjudicative powers").

conditions. Consider---dating back to 1975---the *Georgia Power* case, in which a coal company entered into a ten-year contract to supply coal to a buyer company.[32] There was a base price per ton, and a provision for the calculation of adjustments upon changes in certain labor costs and in "governmental impositions." The agreement also provided that:

> [A]ny gross proven inequity that may result in unusual economic conditions not contemplated by the parties, at the time of the execution of this Agreement may be corrected by mutual consent. Each party shall in the case of a claim of gross inequity furnish the other with whatever documentary evidence may be necessary to assist in effecting a settlement.

And "any unresolved controversy between the parties arising under this Agreement" was to be settled by arbitration. Four years later, after a rapid escalation in prices, the open market price of coal of the same quality was more than three times the current adjusted base price under the agreement. The buyer predictably argued that in light of the contract language suggesting the need for "mutual consent," submitting the question of price adjustment to arbitration would be equivalent to empowering the arbitrator "to make a new contract for the parties." But arbitration was compelled nevertheless.

More recently, price-review mechanisms, "inserted in most long-term natural gas sales agreements," provide a conventional and familiar analogue---responsive to the well-known facts that in long-term commodity sales agreements a "fixed price for 15-20 years is usually unrealistic," and that even an agreed pricing formula may, if unaltered, "reflect a risk that is unacceptable to both of the parties."[33]

Now I suppose it is marginally more convenient---more reassuring for the timid---to find consent to arbitrate when the process is used

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[32] Georgia Power Co. v. Cimarron Coal Corp., 526 F.2d 101 (6th Cir.1975).

[33] See Ben Holland & Phillip Spencer Ashley, Natural Gas Price Reviews: Past, Present and Future, 30 J. of Energy & Natural Resources L. 29-31 (2012). See also id. at 34: A clause suggested as a "typical price review clause" might provide:

> If a circumstance beyond the control of either party results in a significant change in the energy market of the Buyer compared to such energy market on [date], then either party may give notice for a price review. If the parties fail to agree a revised price formula within 90 days after giving notice for a price review, the price formula shall be reviewed by arbitration. In any such arbitration the arbitrator s shall review the price formula and shall decide whether it needs to be revised to reflect, as at the review date, the relevant significant change(s) in the energy market of the Buyer which affect the value of [the product] in the end user market of the Buyer as such value can directly or indirectly be obtained by a prudent and efficient buyer.

• as part of an ongoing, existing contract--to provide a "backup" for a failure of future assent in circumstances expressly contemplated by the parties--than when it is used

• to create an essential term of the contract in circumstances where there has been "no agreement" in the first place.

Only in the former case one can say (as the court did in *Georgia Power*), that since the parties "*remain bound to continued operations under the contract*," "the controversy over a claimed right to price adjustment must be settled somehow in the absence of mutual consent." But note how neatly this conclusory formulation (the "right to price adjustment") begs the question---for the contractual foundation of any such "right" *is the very question that is up for grabs*. The case illustrates, then, how difficult it may be satisfactorily to distinguish

- a dispute over the scope of existing contract "rights"---asking the decisionmaker to do the necessary interpretive work of worrying the agreement, digging out what is already present in germ--and

- an "interest" dispute---asking the decisionmaker to devise the actual contract provisions by which the parties will henceforth be bound.[34]

And the lesson of course is how often the supposed distinction may be—as, after all, are most distinctions in the law—at best, and charitably, a mere question of emphasis or degree. A clause of the sort found in the contract in *Georgia Power* may render the question of arbitral authority marginally easier to resolve, but hardly provides a basis for a difference in principle---and matters of degree should not be turned into matters of principle without some compelling reason to

[34] For a case quite similar to *Georgia Power*---although
- one that seems much closer along the line to the latter of these categories than to the former----
- *and with absolutely no significance to be attributed to the distinction*---

see Aeronaves de Mexico, S.A. v. Triangle Aviation Services, Inc., 389 F.Supp. 1388 (S.D.N.Y. 1974), *aff'd per curiam,* 515 F.2d 504 (2nd Cir. 1975). Here a contract for the servicing of aircraft provided that if the changes in the "volume of flights, aircraft types, arrival/departure times, or cargo load factors" caused "additional manpower and equipment [to] be required," "an increase in the charges *will be negotiated to the satisfaction of both parties."* Again the inevitable claim was made that an arbitrator under the arbitration clause "could not be expected to write a renewal contract for the parties." But the court noted that "it is precisely such questions in specialized commercial dealings of this sort that are especially adapted to resolution by commercial men as arbitrators." And so "a failure to agree would give rise to an arbitrable controversy"---or "[a]t least, the arbitrators could so conclude."

do so. Given a core consent to the process, and a sufficiently broad mandate, the role of the arbitrator is in both cases more or less identical. [35]

c. This notion of curing fatal "uncertainty" through arbitral discretion may not be viewed quite so complaisantly in legal cultures which are somewhat more reticent in accepting all the implications of arbitration as an expression of private autonomy---and where in consequence, the potential of the arbitral process is cabined more tightly---the powers of arbitrators closely identified with, mapped upon, the sphere of action permitted to state courts.[36]

Indeed the authority of arbitrators in the United States to construe contracts so as to fill gaps in insufficiently specified agreements, may be treated as noteworthy and unusual in other states, where it is customary to indulge in sophisticated and rigorous exercises in taxonomy aimed at classifying just what an arbitration "really" "is."[37] A highly conceptual Continental jurisprudence frequently leads to the conclusion that someone who has been asked merely to supply a term in a contract just "can't be" an arbitrator at all.[38] But I would suggest that the notion of a "dispute"---if this is,

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[35] Stefan Kröll notes that "in theory" arbitrators may not "create new obligations for the parties" but may only "determine existing rights" which---while perhaps not "immediately apparent"---"at least in theory already existed before the arbitrators intervened." Kröll, supra n. 24 at 10. But the thrust of his argument seems to suggest----quite correctly---that such a "distinction" will not bear the weight of practical application. I return to this point at the end of this paper in my Conclusion; see text accompanying nn. 207-211 infra.

[36] A good illustration of this point is Société S.E.C.A.R. v. Société Shopping Décor, 1986 Rev. de l'Arb. 263 (Cour de Cassation, 1984). Here a commercial lease provided for the rental to be fixed in terms of a construction cost index; if the index were no longer to be published, and if the parties could not agree on a substitute, it was provided that an alternative index could be chosen by an "arbitrator." A lower court vacated the award on the grounds of public policy, but was reversed by the Cour de Cassation. Professor Mayer doubts, however, whether this should have even been characterized as an "arbitration" in the first place:

> Courts--claiming to interpret the will of the parties--have assumed the power in such cases to determine the index that the parties would have adopted, if the one that has disappeared had never existed. But when [the parties explicitly provide for such a case in their contract, as they have here,] that excludes any possibility of discovering some implicit intention in the contract.... From that moment the role of the neutral is not to interpret, but to freely create, and this role cannot be taken on by a judge--*nor, as a consequence*, by an arbitrator.

Pierre Mayer, Note, 1986 Rev. de l'Arb. 267, 270(my translation, and my emphasis).

[37] See, e.g., Charles Jarrosson, La notion de l'arbitrage 303 (1987); cf. Philippe Fouchard et al., Traité de l'arbitrage commercial international 15 (1996)("a comparative law study will indicate that the distinctions of French law [with respect to the question whether we 'are in the presence of a true arbitration'] are not observed with quite the same rigor in certain other legal systems")..

[38] I gather that in some legal systems, the law revolves around a dichotomy that I have already deprecated as largely formalistic and non-functional. In such cultures,

- it may be permissible for an arbitrator---at least one "appointed as such," or "whom [the parties] describe as such"---who has been charged with a general submission, to supply an omitted term as part of his overall mission; see Jean-Louis Delvolvé et al., French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration 24 (2nd ed. 2009); cf. Giorgio Bernini,

Techniques for Resolving Problems in Forming and Performing Long-Term Contracts, *in Proceedings*, supra n.25 at C.Iva1, 11,15 (here the neutral is not "filling blanks" left open by the parties *ab initio," but instead* "settl[ing] disputes arising from divergent party views over the exact impact the *rebus sic stantibus* clause will have" on the original contract; this is a function "which is strictly arbitral in nature").

- But at the same time, I gather, someone asked merely to come up with a term---*even in a binding fashion---in order to permit "a contract" to come into existence in the first place*---is simply not an arbitrator.

This is a familiar distinction; see, e.g., ICC Partial Award no. 7544 (1995), [1999] J.D.I. 1062 (adjustment of price in case of change order; contract provided that failing agreement by the parties, the price should be "provisionally fixed by the Engineer, then definitively fixed by an arbitral tribunal"); see id. at 1064, 1066 (note D.H.)("the role of the arbitral tribunal was *not exercised in the context of contract formation*, in order to determine an essential element of the agreement, but *in the course of contractual performance*").

It explains the *a priori* assumption in much Continental commentary that when a third party is asked to fix the price in a contract of sale, this "is absolutely not" arbitration---"not at all." Authorization for such a third-party determination is given, for example, in art. 1592 of the French Code Civil: In a contract of sale "the price must be fixed and stated by the parties," although the price "can nevertheless be left to the determination [*arbitrage*] of a third party"; if the third party cannot or is not willing to fix the price, "there is no sale". Apparently such a third party is nothing but an "agent" whose task is "easily distinguishable" from arbitration; the difference lies in the fact that his setting of the price is necessary to the "formation of a contract" by fixing one of its "essential elements"--that is, "an element without which a contract cannot validly exist"---but which now "enables [the contract] to come into existence." See Jarrosson, supra n. 37 at 232, 287, 294-95, 364. So he makes a "simple finding of fact"---and thus "participates in the completion of the contract"---but without being authorized to draw the explicit consequences in terms of legal liability. By contrast, the arbitrator, "like the judge, exercises a jurisdictional function"---that is, the role of both arbitrator, just like the judge, is to "give a legal ruling" [*dire le droit]".* Jean Jacques Daigre, *Note,*[to Cour de Cassation, Feb. 16, 2010), [2010] Rev. de l'Arb. 506, 510; see also Delvolvé, supra at 24-25 (the function of the third party "is not to render an award for the settlement of a dispute between the parties regarding . . . their respective rights and obligations under the contract," but to fix a figure for the price of goods "which will become part of the contract for sale as one of its terms; the contract will thus be complete and capable of being performed"); Jean-François Poudret & Sébastien Besson, Droit comparé de l'arbitrage international 17 (2002) (the decision envisaged by Article 1592--as well as by similar provisions in Italian and German law---merely "determines an essential element of the contract without which the contract remains invalid" (my translation)); Sanders, supra n. 25 at C.IVb2; Pieter Sanders, *L'arbitrage dans les transactions commerciales à long terme,* 1975 Rev. de l'Arb. 83, 85 ("can we expand the notion of arbitration in such a way as to include this kind of decision? It may be unfortunate, but that's really too much of a stretch [*il semble qu'on exagère un peu*]" (my translation)).

If we had to diagnose all this, we would note, clinically,

- the residue of the same tired metaphysical trope of "existence";
- the failure, in consequence, to draw all the necessary functional implications from the canonical rule of "separability"; and at the same time,
- the same culturally-determined definition of the notion of arbitration---requiring it to be aligned ever-so-closely with the judicial model---a model in which claimant and respondent are presumed to
  - have already staked out well-defined but irreconcilable positions, and
  - to have exchanged contradictory pleadings, and
  - to be seeking a judgment of liability founded on reasoning from legal texts; cf. Klaus Peter Berger, Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators, 36 Vand. J. Trans. L. 1347, 1375 (2003)(the traditional distinction between presenting a claim "couched in legal terms" and indicating the existence of "differences of opinion").

really and truly, essential to the definition of a valid arbitration process---is easily capacious enough to encompass the failure of an agreement on price.[39] And more fundamentally: I would suggest that it will prove infinitely less interesting to hunt for the elements that make up "essential parts of the notion of arbitration,"[40] than it is to acknowledge frankly how much a "single unitary model of arbitration" would be misguided---that "the process is sufficiently variable and flexible to accommodate instead a wide spectrum of potential forms."[41]

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[39] But compare *General Motors France v. societé Champs de Mars automobile,* [2011] Rev. de l'Arb. 436-38 (Cour de Cassation Dec. 15, 2010)(note Billemont)("a dispute [*litige*] only exists in the presence of two contradictory *legal [juridiques]* claims"; by contrast, where the legal consequences "have already been stipulated in the contract at the outset [*en amont*]" we have nothing but a "purely factual disagreement")(emphasis in original); Consorts Attali v. Lecourt, [2001] Rev. de l'Arb. 151, 154 (Cour d'appel Paris 1998) (a partner and shareholder in a close corporation agreed to sell his shares to the others at a price to be fixed by two neutrals, in order to "put an end to the differences that had arisen" between them; held, the neutral's decision was not subject to vacatur as an award because there was, "after entering into the agreement which actually put an end to it, no longer any dispute between the parties, but simply a disagreement or a conflict of interests with respect to the price"); Frydman v. Cosmair, Inc., 1995 WL 404841 (S.D.N.Y.)(dissatisfaction with an art. 1592 valuation does not "relate to an arbitration" so as to allow removal to federal court; after all, the parties had informed the neutral that "his decision [would] form the parties' will" with respect to the price, and "[t]hat is hardly the language of dispute").

For an extended argument seeking to demonstrate the contrary, see the discussion in Rau, *The Culture of American Arbitration*, supra n. 26 at 494 (it is "beautifully circular" to say that "there can no longer be any 'dispute' [merely because] the very purpose of the submission agreement itself was to eliminate one!"), 495 (if "this is intended as a serious account of psychological realities [in the face of "conflicting interests, and aspirations"] it seems singularly impoverished").

If the neutral's determination is meant to be *binding on the parties*---which means, I take it, that it will be *enforceable at law*---then attaching importance to whether or not he actually "purported to draw a legal conclusion"---or whether the parties stipulated for such a conclusion in advance---strikes me as trivial and formulaic. Cf. id. at 492 fn. 169 (parties may ask for the resolution of issues of fact or may instead ask for something that "approximates a request for judicial relief," but *it is only the scope of the contractual submission that permits this distinction,"* and it is familiar ground that parties may choose to entrust a particularly broad---or particularly narrow---inquiry to neutrals whom they nevertheless consider "arbitrators"). But apparently in disagreement, cf. Jan Paulsson, The Idea of Arbitration 20 (2013), who reminds us that a ""joint mandate" to arbitrators to "fill a contractual gap" "does not establish breach or fault; nor does it order payment of other remedies. The determination is in principle binding in the manner of a contractual stipulation, but it would also in like manner require further legal action to be enforced by public power." Thus he concludes peremptorily that "the law demands that the categories be distinct"---although at the same time, concededly, the parties themselves "could scarcely care less."

[40] Cf. Kröll, supra n. 24 at 15; see also Bernini, supra n. 38 at C.Iva 11,13 (:where no settlement of opposite claims is provided for," "we are clearly outside of the scope of rules aimed at governing arbitration *stricto sensu"; "*the machinery of international conventions can hardly be deemed applicable to *Arbitrage*"). Cf. Klaus Peter Berger, Power of Arbitrators to Fill Gaps and Revise Contracts to Make Sense, 17 Arb. Int'l 1, 2 (2001)("In his well-known study on hardship clauses published in 1976, Fontaine has asked the question that is still discussed today with respect to gap filling and contract revision by international arbitrators: 'Is this still arbitration?'").

[41] Rau, *The Culture of American Arbitration*, supra n. 26 at 496.

III. "Silence" in the Court

> "It's not the notes that you play, it's the notes that you don't play."[42]

Let's pass over now those rather unusual instances of contractual "failure" and let's assume that the decisionmaker, whoever he may be---whether court or arbitrator---is unwilling simply to leave the parties' losses where they lie---is unwilling to permit one of them simply to walk away from the other without facing the consequences---is satisfied that despite some level of failure to fully articulate the terms of the deal, their intention to form a binding agreement should be honored and that a reasonably certain basis for doing so can be found.[43] The problem presented to him then becomes, just what are the terms of the transaction to be? How is he to proceed given that the text is problematical---that the parties have not, unequivocally and completely, answered the question posed in the litigation?

Rather than discussing this in the abstract, I think it will be helpful to begin with some actual judgments---and I start with a line of cases, all quite similar, all posing more or less the same question, and all decided recently by the U.S. Supreme Court. As Blake said, "To particularize is the alone distinction of merit."[44] It is sometimes striking to see the many things that one can learn if one sets out to deconstruct a line of decisions---teasing out from each concrete instance everything that has been assumed, everything that has been lost sight of, and everything that has been left unsaid.

The Court's decisions in *Bazzle,*[45] *Stolt-Nielsen,*[46] and *Oxford Health,*[47] are interesting case studies: They not only underscore the difficulties inherent in the very notion of "gaps" or "silence," but reveal something else even more fundamental. If the following is the only "takeaway" from the discussion here, I'd be perfectly content:

> Whenever we are talking about ""gaps" in agreements, we are in all probability talking about something else entirely. Tracking the Court's reasoning reveals that "silence" is frequently just a rhetorical trope, one that is responsive to---dependent on---the dialectics of adversarial argument. Implicit in the assertion that the agreement is

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[42] Commonly attributed to Miles Davis.
[43] See, e.g., UCC § 2-204(3) ("a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy"); § 3-305 (open price term; "a reasonable price at the time for delivery" if nothing is said as to price or the parties fail to agree; however, if "the parties intend not to be bound unless the price is fixed or agreed . . . there is no contract").
[44] William Blake, Annotations to Sir Joshua Reynolds' Discourses, *in* 2 Edwin John Ellis & William Butler Yeats (eds.), Works of William Blake 323 (1893)(and "to generalize is to be an Idiot").
[45] Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003).
[46] Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp., 130 S. Ct. 1758 (2010).
[47] Oxford Health Plans LLC v. Sutter, 133 S.Ct. 2064 (2013).

"silent," for example, is likely to be lurking an unexpressed premise[48]---perhaps a hidden assumption

a) with respect to who has the burden of proof of demonstrating some critical procedural question, or

b) with respect to just who the appropriate decisionmaker is to be.

1. "Silence" as the Lack of a Textual Hook: Bazzle

It is best to start with *Bazzle*, which was the first of the Court's cases to worry the question whether it was congruent with the expressed intention of the parties for an arbitration to proceed on a classwide basis. In the courts below the South Carolina Supreme Court had confirmed a hefty class award in arbitration[49]: It had begun by first finding that the parties' agreement "was *silent* regarding class-wide arbitration"; it then asked whether in such circumstances of "silence" "class-wide arbitration is permissible."[50]

Now "silence" is in itself a curious and not particularly helpful construct. P resumably the state court meant to suggest nothing more than that

[48] "Lurking" sometimes in the shadows to the point of invisibility: Thus it would elide a good share of the important work, for example, to assert that where the contract contains no clause expressly guarding against "unforeseen circumstances," arbitrators should be "reluctant to overrule the principle of *pacta sunt servanda* in favour of contract adaptation and gap filling"---and will tend to assume that "the parties have indicated that the principle of sanctity of contracts shall prevail." Cf. Berger, supra n. 40 at 8. That would be simply to assume the content of a default rule with respect to excuse (or shared responsibility) that may or may not be desirable, but whose legitimacy must in any case be demonstrated.

For precisely the same reason, it would elide a good deal of the important work to assert that an arbitrator is powerless to consolidate related arbitrations where the contract contains no clause expressly providing for this, since "if it had been the parties' intention to submit their disputes to a multiparty arbitration setting, they would have so provided in their contracts"; cf. Note, Compulsory Consolidation of International Arbitral Proceedings: Effects on Pacta Sunt Servanda and the General Arbitral Process*, 2* Tul. J. Int'l & Comp. L. 223, 251 (1994) ("If the parties to a multi-party dispute have not explicitly agreed to submit their disputes to a consolidated tribunal, then they have chosen to submit their disputes to separate arbitral tribunals . . . . Under the doctrine of *pacta sunt servanda,* the parties are only bound by what is in the contract."). But see Alan Scott Rau & Edward F. Sherman, Tradition and Innovation in International Arbitration Procedure, 30 Tex. Int'l L.J. 89, 113 (1995)(this "is nothing more than an extravagant form of question begging").

[49] In a class proceeding brought by the Bazzles, the arbitrator had awarded almost $11 million in statutory penalties, and an additional $3.6 million in attorneys' fees, for a lender's failure in violation of state law to notify the borrower of his right to select his own attorney or insurance agent. In a related proceeding the same arbitrator had awarded $9.2 million in statutory penalties, and an additional $3 million in attorneys' fees, to other claimants. There were no "actual damages." Bazzle v. Green Tree Financial Corp., 569 S.E.2d 349 (S.C. 2002).

[50] *Bazzle*, 569 S.E.2d at 351, 359 (emphasis in original).

- the contractual text itself contained no particular semantic "hook" on which meaning could immediately be hung – or alternatively, perhaps, that

- no definitive meaning could be derived from the contractual text alone.

Of course, if this were all there was to "silence," it would be the most trivial of preliminary steps – for it would be an impoverished view indeed of the interpretive enterprise to suppose that one could sensibly stop there; surely some sense of context, and some sort of purposive narrative, are necessary to tease out the parties' "framework of common understanding."[51]

a. Once content with its finding of "silence," however---once it was satisfied the text "said nothing"---the South Carolina court did not pursue any further interpretative path. But it did not fail to perceive the need for what we would call "construction": So the lower court orders compelling class-wide arbitration were affirmed on the ground

   i. that "ambiguous" language must be construed against the drafter; and more fundamentally, on the ground

   ii. of what appears to be *a state-created default rule crafted for circumstances of "silence":* In such cases, the court held, class-wide proceedings are permissible merely on the condition that they "would serve efficiency and equity, and would not result in prejudice."[52]

b. By contrast, for the respondent, it was inappropriate even to go down the path of fashioning these rules of construction: This was because in its view, the agreements between the parties were really, ultimately, *not "silent" at all* – since a fair reading of the text would lead to the conclusion that by their terms they in fact *prohibited* any class-wide proceedings.[53]

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[51] *Cf.* UCC § 1-303 cmt. 3 ("the commercial meaning of the agreement that the parties have made"; usage of trade, as well as the parties' "course of performance" and "course of dealing," "furnish the background and give particular meaning to the language used, and are the framework of common understanding controlling any general rules of law which hold only when there is no such understanding").

[52] *Bazzle,* 569 S.E.2d at 360. The court was hardly unusual in claiming to reach this conclusion "under general principles of contract interpretation"; the common conflation of "interpretation" and "construction," which we will note later, was presumably beyond its ken.

[53] *See* Brief for Petitioner [Green Tree], 2003 WL 721716 at *42-*43 ("the unlikely conclusion that the parties authorized class-action arbitration here is foreclosed by the language of their arbitration agreements"); Final Brief of Appellant [Green Tree Financial Corp.], in the Supreme Court of South Carolina, at 17 ("the fact that the clause limits the scope of arbitrable issues to 'disputes, claims or controversies arising from or relating to *this contract'* evinces an intent that *only* disputes concerning the contract to which the named plaintiffs were a

But then, when the case reached the Supreme Court, this whole trope of "silence" largely disappeared: And the reason for this speaks volumes. Justice Breyer did begin his opinion in *Bazzle* by posing the question in a rather puzzling way: Are the contracts in this case, he asked, "*silent, or do they forbid class arbitration*?"[54] But framing the question in that way was nothing more than a direct response to the dialectic of the parties' argument: This formulation thus neatly encapsulates the contending approaches –between,

- on the one hand, the claimant's invocation of *a state-law default rule* crafted to supplement a supposed textual indeterminacy ["a.ii." above],

- and on the other, the respondent's claim rooted in a *supposed textual prohibition* ["b." above].

Writing for a plurality of four Justices, Justice Breyer rose above all that, and immediately pointed out that the question he had originally posed need not---and indeed, should not---be answered at all: Whichever of the two contending approaches was correct was simply not a matter that fell to be decided by any court, state or federal: Instead it "presents a disputed issue of contract interpretation"---a dispute about what the contract "*means*" (i.e., whether classwide procedures were contemplated)---and was thus (within the language of the arbitration clause) a dispute "relating to this contract."[55] "The parties seem to have agreed that an arbitrator not a judge would answer the relevant question," and although the arbitrators---in going on to administer class-wide proceedings---may have acquiesced in the reading of the contract by the state courts, nevertheless the parties still had not "obtained the arbitration decision that their contracts foresee."

So this was a question that did not go to whether the parties had ever "agreed to arbitrate a matter"(That would have put us in the presence of what it is now customary to call a "gateway" question of "arbitrability.").[56] Instead, the question went to "*what kind of arbitration*

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party, *not* the contracts of absent third parties, were to be arbitrated") (emphasis in the original).

This is of course precisely the tack taken in Chief Justice Rehnquist's dissent in the Supreme Court; *see Bazzle*, 539 U.S. at 455, 458-60 (Rehnquist, C.J., dissenting)---which argued that the Supreme Court of South Carolina had "imposed a regime that was contrary to the express agreement of the parties as to how the arbitrator would be chosen': since its holding "contravenes the terms of the contracts," the state courts had failed to enforce the agreement "according to [its] terms" in violation of § 4 of the FAA.

[54] *Bazzle,* 539 U.S. at 447.

[55] Id. at 447 ("we cannot ["resolve" the question whether the agreement was "in fact silent"] "because it is a matter for the arbitrator to decide")..

[56] See, e.g., Alan Scott Rau, "Arbitrating 'Arbitrability,'" 7 World Arb. & Med. Rep. 487 (2013).

proceeding the parties agreed to." And Justice Breyer thus fashioned a rule by which, under the federal common law of arbitration, this question---a question, by the way, that "the arbitrators are well situated to answer"---is one presumptively entrusted to them by virtue of the standard "broad clause." The state-court judgment was therefore vacated and the case remanded "so that the arbitrator may decide the question of contract interpretation."

It is striking that Justice Breyer reached out for this formula – as far as I can tell – with no particular urging from either party.[57] But to say that an agreement to classwide arbitration involved "a matter of interpretation" is to minimize the significance as well as the likelihood of "silence: At least if the text is not as "clear" in excluding the possibility of classwide proceedings as the dissent assumed[58]---at least, that is, if the matter is semantically "arguable"---then there presumably exists something here to "interpret." And to ask the arbitrators to decide how the contract should be read, means---if understood sympathetically, and with an eye to arbitration practice---that their work should encompass, at the same time,

- a semantic inquiry into the literal words of the text.
- an appreciation of circumstance and context, the "customs and practices which the parties have come to consider as settled patterns of conduct[59] ---all going to make up what was their "bargain in fact";[60] and, as

[57] The claimants---who had prevailed in seeking class-wide arbitration---would certainly have had no reason to urge vacatur and a remand to the arbitrators: Indeed the thrust of their argument was that the decision to order class-wide proceedings *had already been made by the arbitrators*. *See* Oral Argument, Green Tree Financial Corp. v. Bazzle, 2003 WL 1989562 at *37-38 (Justice Breyer suggests that "the correct resolution" is to "send it back to the arbitrator for that determination, not influenced by the South Carolina opinion," but counsel for the claimants demurs, "because the arbitrator already did look at this clause and decided that the language of the arbitration agreement allowed him to decide"); Brief for Respondents [Bazzles], 2003 WL 1701523 at *44 ("there is no reason . . . to conclude that the arbitrator failed to appreciate that the decision was his to make").

For its part, the defendant wouldn't seem to have had much to gain by a remand to the arbitrators either: If anything, it took the position that the decision should be for the *court; see* Oral Argument at *20 (counsel for Green Tree: "whether the arbitrator has the authority to resolve the rights of unnamed third parties is not a question for the arbitrator to decide. That's a question for the court to decide"); Brief for Respondents [Bazzles], 2003 WL 1701523 at *44-*45 (remand to the arbitrator was "a remedy that [Green Tree] never sought here, could not now seek, and in any event does not want"); *Bazzle*, 539 U.S. at 455 (Stevens, J., concurring in the judgment) (defendant Green Tree "merely challenged the merits of the [state court] decision without claiming that it was made by the wrong decisionmaker").

[58] *Bazzle*, 539 U.S. at 451 *(the Chief Justice, dissenting, argues that classwide arbitration would be "contrary to the express agreement of the parties as to how the arbitrator would be chosen," but "we do not believe . . . that the contracts' language is as clear as the Chief Justice believes").

[59] In re Standard Bag Corp. and Paper Bag, Novelty, Mounting, Finishing and Display Workers Union, 45 Lab. Arb. 1149 (1965). See also Lon Fuller, Collective Bargaining and the Arbitrator, 1963 Wisc. L. Rev. 3, 11-12, 17 (the problems in "complicated commercial litigation" "are not unlike those encountered in dealing with labor agreements"; both may involve "complex procedures that vary from industry to industry, from plant to plant, from

well,

- the work of construction to determine what the text should be taken to "mean" – that is, its legal effect.

In resolving disputes over "meaning," no decision-maker – not an arbitrator, and not the South Carolina Supreme Court, nor any common-law court – could be expected to divorce any of these from the others: All are within the sovereign appreciation of a "contract reader."[61]

And so,

- should the arbitrators conclude that class-wide proceedings were indeed permissible, the result would presumably be the same as that mandated by the South Carolina courts---that is, a final and definitive order to that effect---and remand would otherwise have been largely futile.[62]

- In the (virtually unimaginable) eventuality that the arbitrators should conclude that a proper construction of the agreement *forbids* class-wide arbitration, the result would presumably be to the contrary.[63]

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department to department"; "though the terms of [its] vocabulary often seem simple and familiar, their true meaning can be understood only when they are seen as parts of a larger system of practice").

[60] *See* UCC § 1-201(3) ("agreement" is defined as "the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade").

[61] This is the canonical term in labor arbitration, where it is common to say that the arbitrator serves as "the parties' officially designated 'reader' of the contract. He (or she) is their joint *alter ego* for the purpose of striking whatever supplementary bargain is necessary to handle the anticipated unanticipated omissions of the initial agreement," Theodore St. Antoine, Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny, 75 Mich. L. Rev. 1137, 1140, 1142 (1977).

[62] Hence Justice Breyer's stress on the fact that the arbitrators would be particularly "well situated to answer" the question posed, 539 U.S. at 453. Hence above all his invocation of his own earlier opinion in *First Options* – the true teaching of which is that *once a matter has been delegated to the arbitrators by agreement of the parties*, "courts would then be expected to defer prospectively, by refusing to rule on an issue that was entrusted to arbitral decisionmaking, and would be expected as well to defer *after the fact*, by limiting their review to narrow statutory grounds." See Alan Scott Rau, "The Arbitrability Question Itself," 10 Amer. Rev. Int'l Arb. 287, 293 (1999).

[63] *Cf*. David S. Schwartz, Claim-Suppressing Arbitration: The New Rules, 87 Ind. L. J. 239, 257 fn. 89 (2012). Some understatement here: "It seems probable at this juncture that the arbitrator would construe the contract to allow class actions, since the alternative would entail vacating his own class arbitration awards."

No third alternative could have been imagined: That is, it could not have been supposed that there would be some sort of bifurcated proceeding, in which the arbitrators must first decide whether the agreement is notionally "silent" – and if the answer is "yes," then their work of interpretation would be done, returning the legal implications of that conclusion, the question of the appropriate default rule, to

While Justice Breyer wrote only for a plurality of the Court---and no rationale could command the assent of a majority---there was at the least, and clearly, a majority for the limited proposition that on the facts of *Bazzle*---and in the face of an allegation of "silence"---the FAA *did not foreclose a determination by somebody---whether court or arbitrator*--- that class-wide proceedings were permissible.[64] So *Bazzle* was immediately taken to be an endorsement by the Court of a new norm of class-wide arbitrations.[65] So just four or five months after *Bazzle* was handed down, the AAA---in order to "prepare for an anticipated increase in demand for the administration of class arbitrations"[66]---published a set of "Supplementary Rules" for class-wide proceedings; these mirror in many respects Rule 23 of the Federal Rules, and create an elaborate framework for arbitral determinations of the sort envisaged by Justice Breyer: There is first to be an arbitral determination, "as a threshold matter," on the "construction" of the arbitration clause---to determine whether it permits the arbitration to proceed on behalf of a class. A party may move to confirm or vacate this "clause construction award," and after a stay for the purpose of seeking judicial review, the arbitrators are then to proceed to determine the question of class certification – that is, whether the case "*should* proceed as a class arbitration." Thus by virtue of the rules, incorporated as part of the parties' agreement, a contractual delegation of decisionmaking authority to the tribunal is clear[67] ---although at the same time the rules caution that in

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the courts. Such a model would be at the same time unworkable, incoherent and naïve.

[64] Justice Stevens, who cast the deciding fifth vote in the case, agreed that "the decision to conduct a class-action arbitration was correct as a matter of law," *Bazzle*, 539 U.S. at 455 (Stevens, J., concurring in the judgment). So there's the majority for the proposition that *classwide proceedings were permissible if ordered by someone.* Justice Stevens was however content to rely, without more, on the application by state courts of their own default rule. But leaving the decision to state courts would have led to an affirmance of the judgment below---and the plurality preferred to reverse, so that the question could be presented de novo to the arbitrators. So, conceding the essential, Justice Stevens concurred in the result and agreed that the matter of contractual interpretation "arguably" should have been made "in the first instance by the arbitrator," *Bazzle*, 539 U.S. at 455 (Stevens, J., concurring in the judgment)).

[65] *Cf*. S.I. Strong, The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?, 30 Mich. J. Int'l L. 1017, 1022-23 (2009) (where an international class arbitration is seated in the U.S., "because the United States has already judicially approved of the class arbitration mechanism," a losing respondent will not be able to argue that the class-wide proceeding is "presumptively disfavored as a matter of international law or policy"); Shroyer v. New Cingular Wireless Services, Inc., 498 F.3d 976, 991, 992 (9th. Cir. 2007) ("we read [*Bazzle*] as an implicit endorsement by a majority of the Court of class arbitration procedures as consistent with the Federal Arbitration Act"; since "class arbitrations further the FAA's purpose of encouraging alternative dispute resolution," our holding that a waiver of class proceedings is unconscionable cannot in consequence be preempted as in conflict with federal policy).

[66] *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., Brief of AAA as Amicus Curiae in Support of Neither Party, 2009 WL 2896309 at *9.

The AAA's searchable class arbitration "docket" of cases administered by the institution is available at its website at www.adr. org. As of May 6, 2014, it included 376 cases, including cases that were inactive because settled, withdrawn, or dismissed, and awards that had been vacated.

[67] These supplementary class rules are to apply to any contract calling for arbitration under any body of AAA rules (although the AAA will not "administer class arbitrations where the underlying arbitration agreement

"construing" the arbitration clause the arbitrator is not to "consider" the existence of the rules "to be a factor either in favor of or against permitting the arbitration to proceed on a class basis."[68]

2. "Silence" as the Failure of Agreement: Stolt-Nielsen[69]

The trope of "silence" played a quite different, and far more problematical, role in another "class arbitration" case a few years later.

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explicitly *precludes* class procedures," Commentary to the American Arbitration Association's Class Arbitrations Policy, Feb. 18, 2005).

[68] R. 3. In short, mere agreement to the rules does not in itself amount to an "agreement to classwide arbitration" – is not even probative of any such agreement. There is a simple grant of authority to the arbitrators, but this does not in itself amount to expressing a preference for arbitral judgment to be exercised in any particular way.

Cf. Strong, *supra* note 65, at 1073-74. Professor Strong criticizes the AAA rules for "apply[ing] the concept of implied consent to allow retroactive application" to parties whose contract may "dat[e] back to the 1970's or 1980's when the rules were "not even in existence" – resulting in unfair "surprise." Does this suggest, by negative implication, that if the rules had indeed been "in existence" at the time the contract was entered into, we would then be warranted in drawing the opposite conclusion--- there had in fact been "consent" to classwide proceedings? Precisely the same problem is lurking in her suggestion that there would be no problem in finding "implied consent to classwide proceedings" where parties have chosen as the seat of the arbitration a jurisdiction "that recognizes arbitrators' authority to order classwide proceedings," *id*. at 1062-67 & n.209. Presumably to choose a *lex arbitri* is presumptively to choose the law in force at the seat *at the time the proceeding is instituted*, not the law that might have been in effect at the time when the contract was drafted.

All this highlights a far more fundamental problem: I confess that I still remain unsure whether the "implied consent' that Professor Strong is discussing, is in fact,

- "consent" to *empower the arbitral tribunal as the ultimate decisionmaker* [which will raise the question whether authority to order a classwide proceeding was ever conferred on the tribunal in the first place], or
- "consent" *to the actual classwide proceeding itself* [raising the question, for the tribunal, whether such a proceeding would be within the parties' expectations, and for a reviewing court, whether the undoubted jurisdiction of the tribunal has been exercised in an illegitimate manner].

Bazzle itself of course is a case that raised the former issue---where class arbitration rules did not exist at the time of contracting, but the existence of arbitral power was deduced from a general broad grant of decisionmaking authority. *Stolt-Nielsen* and *Oxford Health* are cases that raise the latter issue. The sentence I quoted above ["[if the arbitration agreement points strongly to seating the proceeding in a jurisdiction (such as the U.S.) that recognizes *arbitrators' authority to order classwide proceedings*, then the parties may be said to have implicitly *consented to classwide proceedings*").] shows how easily these two questions can be conflated--- despite the earnest attempt by the AAA to keep them separate---shows how easily one can deduce the latter form of "consent" from the former--- and so powerfully suggests that despite the caveat of R.3, the gravitational pull of these rules can be very intense indeed.

[69] Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp., 130 S. Ct. 1758 (2010).

In *Stolt-Nielsen,* a number of charterers had brought antitrust suits against a shipping company, each purportedly on behalf of a class, and later consolidated. The respondent had successfully moved to compel arbitration, and the claimants then demanded a class-wide arbitration proceeding. The contract had not originally incorporated the rules of the AAA, but the parties---"in light of *Bazzle"*[70] ---entered into a "supplemental agreement" by which the question of class arbitration was to be submitted to a panel of three arbitrators, who were to "follow and be bound by" the AAA's Supplementary Rules for Class Arbitrations; an arbitral tribunal was empanelled under those rules to render a "clause construction award." You will note immediately that this agreement of the parties rendered the jurisdictional holding of *Bazzle* largely irrelevant: We have here an express grant of power to the arbitrators that replaces the presumed allocation, found by the plurality in *Bazzle* to be implicit in the arbitral enterprise.

The arbitrators then went on to conclude that the arbitration clause did indeed authorize classwide arbitration.[71] The respondents sought to have this "clause construction award" vacated, and in a most conventional analysis, the Second Circuit rebuffed the attempt: Repeating the mantra that "interpretation" is "an area we are particularly loath to disturb," it concluded that an arbitrator's "misapplication" of a contract's terms can hardly "rise to the stature of 'manifest disregard'" of the law---whatever that means---and that determinations of custom and usage, informing any reading of a contract, are themselves in any event "findings of fact" wholly immune to review on any such grounds.[72]

Now one would have thought that the next step could have been predicted with some confidence. The Court in *Bazzle*---after remanding for an arbitral exercise in construction---had seen no need to go further: That is, it saw no need to address what standards the arbitrators would be expected to use, or what sort of decision (if any) the FAA might require, or what level of scrutiny a court would be expected to deploy. For after all, the answers to all of these questions might reasonably have seemed

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[70] Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., Brief for Petitioners, 2009 WL2809359 at *7.

[71] The arbitrators claimed to believe that the resolution of this issue was "controlled by the Supreme Court's decision in [*Bazzle*]"---but this betrays considerable misunderstanding and can't be taken at face value: However receptive to the notion of class-wide proceedings, and however deferential to arbitral competence, the Court in *Bazzle* provided no guidance at all with respect to how an arbitral tribunal should proceed.

[72] *Stolt-Nielsen S.A.*, 548 F.3d at 98.

Nor could the court find any state or federal maritime "rule of construction" that "clearly governs" the issue here – that is, which governs whether a failure to address the question of class-wide arbitrations should be taken to be probative of an intent not to *allow* them, or of an intent not to *prohibit* them. *Id*. at 99. By contrast, as we have seen, a "rule of construction" with respect to this issue was precisely what the South Carolina courts had found and applied in *Bazzle (*although only Justices Stevens and Thomas thought that deference to this rule was necessary).

implicit in the holding: The plurality there had pretty clearly taken the view that the availability of class-wide proceedings did not even rise to the level of what we have become accustomed in this country to call a "gateway question of arbitrability."[73] And what can we possibly mean when we say that an issue is not one of "arbitrability"? Only this: that we are willing, *at the very outset,* to *presume* that the parties have consented to entrust it to the arbitrators, without any need for an express allocation. This must be true a fortiori when we can find such a delegation of authority in the form of the parties' express submission to the AAA rules. And if we are satisfied that the parties have in fact done this, then we would expect an arbitral award on the subject to command precisely the same degree of deference as would *any* decision "on the merits" resolving a dispute submitted by contract to the tribunal.

Nevertheless the Supreme Court reversed, mandating that the award should be vacated. While *Bazzle* itself could not be directly overruled,[74] the inevitable second thoughts, changes in the composition of the Court, [75] and the dreaded spectre for a corporate-oriented Court of an increased resort to classwide proceedings, all meant that earlier confident predictions were to prove fruitless. For the Court in *Stolt-Nielsen,* there

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[73] As it "concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties." *Bazzle*, 539 U.S. at 452.

See Alan Scott Rau, *"Consent" to Arbitral Jurisdiction: Disputes with Non-Signatories*, *in* Multiple Party Actions in International Arbitration: Consent, Procedure and Enforcement 69, 71 (Belinda Macmahon ed., 2009):

> This "question of arbitrability" – whether there is a "duty for the parties to arbitrate" the dispute – whether the parties have consented to a final arbitral judgment on the issues – whether, in short, the arbitrators have "jurisdiction" to decide – is undeniably an issue for judicial determination.

Yes, I appreciate that the terminology is highly fraught and that our usage is completely at odds with the way that the notion of "arbitrability" is used in other legal systems; see Jan Paulsson, *Jurisdiction and Admissibility*, *in* Gerald Aksen (ed.), Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner 601, 609 (2005)(our "persistent abuse" of this "vaporous locution" "has led to international disharmony, because elsewhere that word has an established meaning" referring to public policy limitations upon what it is legally permissible to arbitrate). I have in fact often suggested that the term "can easily be dispensed with," Rau, *"Separability,"* supra n. 13 at 120.

[74] The Court in *Stolt-Nielsen* acknowledged that *in light of the express agreement of the parties subjecting themselves to the AAA rules,* "we need not revisit" the question whether the permissibility of class-wide proceedings was otherwise reserved for the arbitral tribunal, *Stolt-Nielsen*, 130 S. Ct. at 1772.

[75] The Court was divided 5-3. (Justice Sotomayor did not participate).Justice Kennedy, who had dissented in *Bazzle* on the ground that ordering class-wide arbitration was impermissible as a matter of federal law, naturally found himself in the majority here, as did Justice Alito and Chief Justice Roberts. Justice Thomas had also dissented in *Bazzle*---but on the basis of his customary and idiosyncratic position that state court arbitration rulings should not be interfered with by federal law; here, though, the absence of any overt Supremacy Clause concerns left him free to join the majority as well. The fifth vote of Justice Scalia---who had concurred in Justice Breyer's opinion in *Bazzle*--- is considerably more difficult to rationalize. Justice Stevens, who had been willing to join the plurality in *Bazzle*---at least to the extent of remanding the case and preserving the issue of contract construction for the arbitrators---appropriately dissented in *Stolt-Nielsen* (as did of course Justice Breyer himself and Justice Ginsburg, both of whom were in the same position).

was no basis at all for the tribunal's endorsement of a classwide proceeding. The holding can be broken down into two parts:

1. Instead of making some "determination regarding the parties' intent"[76]---and instead of "identifying and applying a rule of decision" derived from state or federal law[77]---the arbitral tribunal had merely "imposed its view of sound policy"[78]---and by doing so, had "exceeded its powers" under§10(a)(4) of the FAA.[79]

2. Nor was there any reason, after vacatur, to remand and "direct a rehearing by the arbitrators" under §10 (b) – that would be pointless because "there can be only one possible outcome on the facts before us": Since there was no "contractual basis" to support a finding of consent to class-wide proceedings, the parties "cannot be compelled" to participate in one.[80]

[76] *Stolt-Nielsen*, 130 S. Ct. at 1768 n.4.
[77] *Id.* at 1770.
[78] *Id.* at 1767-68
[79] *Id.* at 1770; *see also id.* at 1767-68.
This was the only invocation of any statutory ground for vacatur. I should mention that in the early proceedings below the district court had in fact vacated the award using a different formulation---relying on the assertion that the tribunal had "manifestly disregarded a well defined rule of governing maritime law." It is hard to know what to make of this; could it mean that the arbitrator is tasked with having *disregarded evidence with respect to the content of the prevailing custom and usage?* See *Stolt Nielsen,* 435 F.Supp.2d at 387 n.3. ("silence" "simply opens the door to extrinsic evidence, which here strongly supports Stolt's position"); But see Alan Scott Rau, *The Culture of American Arbitration,* supra n. 26 at 526 (even in the Second Circuit the notion of "manifest disregard of the evidence" is "now treated as a mere sport in the law, having joined the choir invisible of discarded conceits."). The Supreme Court did touch on this matter briefly, in a rather curious footnote, *Stolt-Nielsen*, 130 S. Ct. at 1768 n.4:. Justice Alito remarked that "we do not decide" whether the "manifest disregard" ground still "survives" as an "independent ground for [judicial] review" – but added that "assuming, *arguendo*, that such a standard applies, we find it satisfied for the reasons that follow." All this is lazy and readily lends itself to ridicule; *see* Adam Samuel, *The U.S. Supreme Court's Undistinguished 2010 Trilogy: An English View,* DISP. RES. J., Feb.-April 2011, at 33, 35 ("dodging issues"), 36 ("painful fence- sitting"). But I don't find the Court's footnote overly bizarre: For all the Court is really saying, at bottom, is that any notion of "manifest disregard" doesn't, and can't, matter much in the sensible resolution of any case---which must be arrived at on other grounds and for other reasons. And this is something we knew all along.
[80] *Stolt-Nielsen*, 130 S. Ct. at 1770, 1776.

a. "A Determination Regarding the Parties' Intent"

"I used to teach Contracts, did you know that?"[81]

The first of these holdings has by far the most resonance for our present concerns: It is also by far the most inexplicable, and ultimately the least defensible. So naturally I will dwell on that here.

Now if a claimant is demanding that a court – or an arbitral tribunal – order "his" arbitration to proceed on a class-wide basis, what is the route to such a conclusion: What is the link between the demand and the order?

What is clearly the appropriate starting point is some sort of finding to the effect that this would be consistent with the " agreement of the parties."[82] The "threshold" inquiry mandated by the AAA's "Supplementary Rules for Class Arbitration" is whether the arbitration clause "*permits* the arbitration to proceed on behalf of" a class. At oral argument, Justice Scalia complained that this "doesn't help me a lot. What does it mean, 'if it permits it'? . . . [D]oes that mean whether the parties have agreed to it?"[83] Well, not quite: I would suggest that the proper answer to his question would have been this: The Rules simply envisage a "level 2" inquiry[84] into, "*whether the ability to order class-wide proceedings is within the scope of the powers granted by the parties to the arbitrators*?"

Before the arbitral tribunal, the parties in *Stolt-Nielsen* had apparently agreed that the arbitration clause said nothing particularly explicit on the issue of class-wide proceedings – but that it was instead "silent."[85] Before the case was over this trope

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[81] Oral Argument, supra n.3, 2009 WL 4662509 at *39 (Justice Scalia).

[82] Section 4 of the FAA, as we know, mandates a court "order directing the parties to proceed to arbitration in accordance with the terms of the agreement." And after an award has been rendered, § 10(a)(4) provides for vacatur where the arbitrators were "guilty" of "misbehavior by which the rights of any party have been prejudiced": It should hardly be surprising that this antique formulation does not expressly track Art. V(1)(d) of the New York Convention – which permits a refusal of recognition and enforcement where "the arbitral procedure was not in accordance with the agreement of the parties" – but it *would* be surprising indeed if the scope of § 10 were held to be much narrower and not to encompass these Convention grounds as well; *cf.* 2 Gary B. Born, International Commercial Arbitration 2595 (2009)("in jurisdictions where no statutory provision directly addresses the subject, courts have nonetheless held that arbitral awards are subject to annulment if the arbitrators fail to observe the procedures agreed by the parties"); *cf.* Alan Scott Rau, The New York Convention in American Courts, 7 Amer. Rev. Int'l Arb. 213, 236 (1996) ("as a practical matter [it is] highly unlikely – to put it mildly – that actual results in concrete cases will tend to diverge significantly depending on whether an award is scrutinized under Article V of the Convention or under § 10 of the FAA").

[83] *See* Oral Argument, supra n.3, 2009 WL 4662509 at *52.

[84] See Rau, *"Separability,"* supra n. 13 at 92-94, 110-11 ((elaborating a "conceptual framework" involving "three separate questions [that] will recur in connection with any arbitration").

[85] Brief for Petitioners, *supra* note 70, 2009 WL 2809359 at *8.

of "silence" had come to mean something quite different from what it meant in Bazzle---but that such an offhand remark would ultimately assume such an outsized and outlandish importance, must have been a considerable surprise to everyone.

At the outset, summoning up this notion of "silence" seemed to be little more than a rhetorical shorthand: For the claimant, "*because* the arbitration clauses were silent, arbitration on behalf of a class could proceed."[86]

> (Here's the premise underlying that: Recall that Justice Breyer framed the problem faced by the Court in *Bazzle* as a choice between two "contending approaches"--between, on the one hand, a state law default rule deployed in the event of textual indeterminacy, and on the other hand, "the respondent's claim rooted in a supposed textual prohibition." So the claimant's obvious intent was to invoke Justice Breyer's dichotomy---and in doing so to point out the preferred alternative. In other words, to eliminate the latter prong---there could be no prohibition "because the arbitration clauses were silent"---would, it was hoped, necessarily open the door to choosing the former – that is, it would permit an arbitral choice of a default rule that would operate in his favor; under this formulation classwide arbitration was privileged to the extent that a reluctant party was required to affirmatively demonstrate a manifested intention to *exclude* it.)

For the respondent, by contrast, "*because* the arbitration clauses were silent, the parties intended not to permit class arbitration"[87]:

> (And here is the premise underlying *that*: The obvious purpose here was to invoke the many cases that, over the years, tended to assume – again, in the absence of some explicit authorization – that federal courts lack any power to order the consolidation of related arbitrations. Reliance on this federal background law would, supposedly, explain and justify the lack of any more precise provision with respect to class proceedings).[88]

So the conceit of "silence" here could not have been meant to carry much beyond

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[86] *Stolt-Nielsen*, 548 F.3d at 89 (emphasis added).

[87] Id.

[88] See generally Rau & Sherman, supra n. 48, 30 Tex. Int'l L.J. at 113 ("the dominant emerging tendency" has been a "presumption against consolidation in the absence of some affirmative evidence that the parties have consented to it, either in their original agreement or later at the time of submission").

For this argument by the respondents, see Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., Clause Construction Hearing, Joint Appendix, 2009 WL 2777896 at *104a-*105a ("you have to know what the law said at the time you enter this agreement because you're not going [to] write down everything the law gives you anyway. . . . [T]hroughout this time period, they knew you couldn't consolidate."); Brief for Petitioners, *supra* note 70, 2009 WL 2809359 at *8 ("In the face of that silence, [respondents] cited federal case law prohibiting class or other consolidated arbitration without all parties' consent").

the usefulness of such a frame in the dialectic of adversarial argument:[89] Nor did any supposed agreement along those lines prevent the parties from engaging in sustained and vigorous argument, both semantic and otherwise, with respect to what their "true intention" had been: A reading of the briefs and the transcript of the oral argument hardly suggests that they thought this question of interpretation had been stipulated away.[90] And neither the district court nor the court of appeals made the slightest reference to it below: Indeed the award in *Stolt-Nielsen* did purport to proceed by divining contractual intent from the language of the agreement,[91] and the

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[89] This insistence by the parties on mutually exclusive default rules triggered by "silence" also presumably explains their convergence on the proposition that the contract was "unambiguous" – with the apparent consequence that any need to consider "parol evidence" was obviated. *See* Joint Appendix, supra n. 88 at *77a (counsel for claimant: "all the parties also agree that the arbitration clause is unambiguous"); *Stolt-Nielsen*, 130 S. Ct. at 1770.

The continuing insistence by lawyers on the supposed lack of "ambiguity"---even in circumstances where it serves no particular function---that is, even in circumstances where there is no danger whatever of wayward fact finding on the part of a jury---continues to bemuse me. *Cf.* Restatement (Second) Contracts, § 212 cmt. d. ("historically," "partly perhaps because of the fact that jurors were often illiterate, questions of interpretation of written documents have been treated as questions of law in the sense that they are decided by the trial judge rather than by the jury"). For the same reasons – while the concept of "an agreement that is silent" is challenging enough – the category of "an agreement that is *unambiguously* silent" is merely calculated to cause migraine. *But cf.* William Whitehill, Class Actions and Arbitration: Murky Waters, 4 World. Arb. & Med. Rev. 1, 2 (2010).

But it is simply not our lot to escape doubt. I still remember an episode from my first-year Contracts class, when during a discussion of the Restatement First § 31 ("In case of doubt it is presumed that an offer invites the formation of a bilateral contract"), our professor asked, "but what of the case where there is doubt as to whether there is doubt?" Even at the time, I think, I sensed that this could not have been intended to be taken seriously as a useful aid to taxonomy – although in the hands of the much- and appropriately-revered Jack Dawson it was certainly clever enough Socratically.

[90] For the claimant in the arbitration (AnimalFeeds): Brief for Respondent, 2009 WL 3404244 at *33-*34 ("the contract's conferral on the arbitrators of power to decide '*any*' dispute is most reasonably read as not limited to the subset of disputes between a single parcel tanker owner and a single customer"; "so, too, the clause's use of the term 'dispute' is permissibly read to include disputes involving multiple parties, as here"); Oral Argument, supra n.3, 2009 WL 4662509 at *43-*44 (counsel for claimants: "that goes back to whether 'any disputes' can plausibly be read to encompass the class mechanism, because if it can, well then, by agreeing to that contract, you have, in effect, agreed to something that delegates to the arbitrator the ability to use that"); *see also* Clause Construction Hearing, Joint Appendix, supra n.88, 2009 WL 2777896 at *79a ("the arbitration clause here contains broad language and this language should be interpreted to permit class arbitrations"; "the term 'any' and 'all differences and disputes of whatever nature' . . . would include class arbitrations").

For the respondent: See id., 2009 WL 2777896 at *92a-*93a ("you guys read the contract and you figure out the procedures that apply, whether we contemplated having a class action or not"); *id.* at *95a (Arbitrator Jentes: "What's the issue?"; counsel for respondents: "What do the parties intend in this contract. Basic contract interpretation. And it's for you to decide"); Brief for Petitioners, 2009 WL 2809359 at*21 (before the arbitrators, respondents argued "that in context, the [arbitration] clause should be construed to prohibit class arbitration as a matter of properly inferred intent"); Oral Argument, supra n.3, 2009 WL 4662509 at *15-*16 ("our position about the construction of the contract was that in fact, although there is no express provision one way or the other, this is a maritime contract, and the---and maritime law is ascertained by custom and practice, and we introduced evidence in the form of affidavits that were unrefuted . . . since the days of Marco Polo. . . .").

[91] The arbitral award acknowledged that the arbitrators "must look to the language of the parties'

entire thrust of the Second Circuit's decision was deference to the arbitrators' own exercise in "interpretation" and to their "findings of fact"---finding their reading of the agreement to be "at least colorable."[92]

Nevertheless the Supreme Court took this putative stipulation and---with no particular urging from anyone---ran away with it. On the matter of "silence," the claimant had in fact gone on to concede that "when a contract is silent on an issue there's been no agreement that has been reached on that issue."[93] For the Court, this did not suggest merely that there had been no "express reference" to class-wide proceedings---it implied as well that the parties had had no understanding with respect to the matter whatever---that is, that *at least with respect to that particular term, there had been no "meeting of the minds" at all.*

And what are the implications of *that*, exactly?

Now as we have seen, there exists a weak account of what "silence," or "gaps"---we might prefer to talk instead of "omitted terms"---can mean: On this account the problem is merely this---that *the text of the agreement does not explicitly and immediately direct us to any conclusion* with respect to intent, or with respect to how a question of "meaning" should be resolved. In such cases, whoever is charged with giving effect to the contract must begin by trying to tease out what the parties had wished to do, through recourse to the usual extrinsic methods for determining the content of the "bargain in fact"---either by

- "worrying the text of the agreement in order to discover some sort of underlying narrative,"[94] or by

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agreement to ascertain the parties intention whether they intended to permit or to preclude class action," *see* 548 F.3d at 97. And so on review, the claimants not only argued the point of interpretation, but in fact went further – suggesting that *they had actually submitted* this question of contract interpretation to the arbitrators, and that the arbitral award, ordering class-wide proceedings, had been rendered *precisely on that basis and in response to its arguments*; *see* Oral Argument, supra n.3, 2009 WL 4662509 at *30-*32 ("what they relied on was the broad language of the agreement, the language 'any disputes'"; "they are saying: We are not going to do this based on a default rule; we are going to do this based on the language and intent. Right?"); *id.* at *55 (counsel for claimants had previously made "the argument that we believe the arbitrators adopted, which is that the arbitration clause here contains broad language, and this language should be interpreted to permit class arbitrations").

[92] *Stolt-Nielsen*, 548 F.3d at 99.

[93] Clause Construction Hearing, Joint Appendix, supra note 88, 2009 WL 2777896 at*77a. But – once again – this can only be understood in the context and flow of the argument – as an attempt to underline that a favorable default rule remained available: "*Therefore*," the claimant went on, "there has been *no agreement to bar* class arbitrations." *Id.*

[94] See Rau & Sherman, supra n. 48, 30 Tex. Int'l L.J. at 112 & n. 124 (for example, a court might be able "to find some sort of 'implied' consent to consolidation" of related proceedings where it is presented with a vertical chain of related contracts and subcontracts).

- looking to context and circumstances ("surrounding" by definition) to help determine the "commercial meaning" of the language and the "framework of common understanding."[95]

Indeed the arbitral tribunal in *Stolt-Nielsen* had made gestures in this direction[96]---but for Justice Alito, it had been entirely illegitimate for it even to begin to go down this path. This suggests a much stronger version of "silence"---one asserting that the parties' "stipulation" of "no agreement" had necessarily barred, at the outset, *any of the traditional routes to contractual interpretation:* The arbitral tribunal, he wrote, had "had no occasion to 'ascertain the parties' intention' . . . because the parties were in complete agreement regarding their intent"---that is, presumably, that *they were in complete agreement that they had no intent at all*. In such circumstances, "any inquiry into that settled question would have been outside the [tribunal's] assigned task," and even the wording of the agreement itself "was quite beside the point." All that could be left, then, was not "interpretation" but the tribunal's own idiosyncratic "policy choice."[97]

In doing this the "contract reader" will not disdain resort to marginal bits of homely "folk wisdom" that purport to tell him, as an empirical matter, how most people--draftsmen and legislators--are likely to deploy grammar and syntax. This includes, for example, many of the canons of construction; cf. Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302 (2000)(where Congress excluded from the reach of the FAA "contracts of employment of seamen, railroad employees, *or any other class of workers engaged in foreign or interstate commerce,"* the italicized language must not be interpreted literally and in isolation from the rest---but must be understood in light of--and thus modified, qualified and restricted by, "controlled and defined by reference to"--the specific categories that precede it). Not all the canons, of course, can be described in that way; see, e.g., the dreaded canon *contra proferentem,* discussed at text accompanying nn. 154-58 infra.

[95] See text accompanying nn. 51, 59-61 supra.

This role of context in helping to determine the "framework of common understanding" assumed particular importance in the *Stolt-Nielsen* litigation. See Stolt- Nielsen SA v. AnimalFeeds Int'l Corp., 435 F. Supp. 2d 382, 385-86 (S.D.N.Y. 2006) ("in the maritime area . . . the interpretation of contracts **–** and especially charter party agreements **–** is very much dictated by custom and usage," and "experts in international maritime arbitrations [testified] to the effect that sophisticated, multinational commercial parties . . . would never intend that the arbitration clauses would permit a class arbitration"), *rev'd*, 548 F.3d 85, 97-98 (2d Cir. 2008) ("custom and usage is more of a guide than a rule"). In the Supreme Court, Justice Alito moved seamlessly from

- noting the undisputed "expert opinion" with respect to the expectations of "sophisticated, multinational commercial parties"--- summarizing, in a long footnote, extensive "expert evidence from experienced maritime arbitrators," "demonstrating that it is customary in the shipping business for parties to resolve their disputes through bilateral arbitration"; seed *Stolt-Nielsen,* 130 S. Ct. at 1769 n.6 ("in the view of the London Corps [sic] of International Arbitration, class arbitration is 'inconceivable'"),
- to a conclusion that the tribunal has "simply imposed its own conception of sound policy," *Stolt-Nielsen,* 130 S. Ct. at 1769.

This is either a non sequitur, or, more likely, a commentary to the effect that the tribunal had wantonly ignored the weight of the evidence.

[96] See n. 91 supra.

[97] *Stolt-Nielsen,* 130 S. Ct. at 1770.

Now a formal stipulation to the effect that the parties had not arrived at any common understanding with respect to a particular contractual issue---that on this issue, there were "no concordant wills"[98]---is surely uncommon. (Perhaps, though, the fact of expressly leaving a term open---in the form of an "agreement to agree" on it at some later time---might in the end amount to much the same thing?[99]). I have suggested in fact that in the procedural context of the *Stolt-Nielsen* litigation, the supposed "stipulation" was "largely fictive anyway," the Court's treatment of it "reek[ing] of disingenuousness": For "it seemed to operate here largely as a trap for the unwary claimant, who could hardly have imagined that he was conceding the very question of interpretation on which his case rested."[100] Nevertheless it is surely not unusual for the parties to enter into an agreement that purports to be a contract---that they believe to be a contract---without "agreement [having] been reached" on any number of terms, whether of price, or delivery, or conditions of financing---and this for any of a number of reasons that we have already canvassed.

At the same time it could not seriously have been argued in *Stolt-Nielsen* that a finding of "no agreement" with respect to classwide proceedings alone, could possibly suggest that the entire contractual process had aborted---that any "manifestation of mutual assent" to the exchange was lacking---that the "gap" had thereby swallowed up everything that *had* actually been agreed to, forcing us to conclude that the parties had never intended to be contractually bound at all. Nor was this argued. For such a notion to come into play---for us to conclude that there was "no contract"---"the area of non-agreement would have to be considerably broader, and closer to the 'bounds of the entire consensual perimeter,' than was the case in *Stolt-Nielsen.*"[101]

In those circumstances, then, Justice Alito's reaching out to attribute significance to some supposed "stipulation" is especially telling---because it illustrates, I think, precisely where the Court went astray. The critical flaw lies in the limits that *Stolt-Nielsen* independently imposes on the process of contract construction when carried on by an arbitral tribunal---and in the cramped and cabined view of arbitral adjudication that the opinion reveals. For if we are really satisfied that the parties have "failed to

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[98] Fried, supra n.3 at 60.

[99] See nn. 19-21 supra.

[100] Alan Scott Rau, Arbitral Power and the Limits of Contract: The New Trilogy, 22 Amer. Rev. of Int'l Arb. 435, 460 (2011).

See also Jock v. Sterling Jewelers, Inc., 646 F.3d 113, 129 fn. 2(Winter. C.J., dissenting)("If *Stolt-Nielsen* resolves only the effect of a *sui generis* and idiosyncratic stipulation of the parties, the case hardly meets [the criteria for granting a writ of certiorari (that "an important question of federal law" "has not been, but should be, settled by this Court")).

[101] Rau, supra n. 100 at 462. Where the clause is marginal to the exchange, this must be true even where the "gap" was not the result of crossed signals---or a mere "blind spot"---but where the parties entered into the agreement despite the fact that they were "*at all times . . . painfully aware of their contradictory understandings of a contractual term*," see n. 17 supra.

manifest any type of inferable assent" with respect to a particular question,[102] then *the work of giving "meaning" to the contract hardly ends – really, it is just barely getting underway*.

An obvious, but modest, start is to look at the structure and purpose of the agreement, inquiring into the solution that would be most congruent with the "overall objectives of the parties."[103] Once we can identify the "sense of the transaction"---what the parties were about, and what they were trying to do---the question whether there has been a true "meeting of the minds" may begin to seem somewhat arid and abstract: Indefiniteness can often be cured by little more than an exercise of practical wisdom, striving to give content to the agreement by ensuring the "business efficacy" that the parties "must have intended" the transaction should have.[104]

To privilege a meaning towards which "most sensible people" would gravitate, may not, perhaps, always lead us directly to what the parties actually "had in mind when contracting"---but it is intended to coincide with "what a reasonable person would have understood under the circumstances."[105] More precisely, perhaps, it is intended to coincide with (1) what a reasonable plaintiff believed and (2) *had the right to believe*---as long as (3) *a reasonable defendant ought to have realized* that such was the plaintiff's understanding. But *that*, of course, is precisely what the Orthodox "objective theory of Contracts" treats as the primarily relevant intention---or more properly, treats as the appropriate *definition of contractual intention*---that is what

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[102] Ben-Shahar, supra n. 2 at 393.

[103] Rau & Sherman, supra note 48, at 114.

[104] The classic demonstration, if one is to take it at face value, is that of Justice Cardozo in Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214 (N.Y. 1917) ("A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed"). *Cf*. Posner, supra note 4, at 1603-04 (if "one of the rival interpretations proposed does not make commercial sense, the interpretation will be rejected because it probably does not jibe with what the parties understood when they signed the contract"); Ian R. Macneil, Efficient Breach of Contract: Circles in the Sky, 68 Va. L. Rev. 947, 953n.25 (1982)("'Casual empiricism' is *not* a pejorative in my vocabulary; indeed, when used by wise people its other name is wisdom").

See also Omri Ben-Shahar, The Tentative Case Against Flexibility in Commercial Law, 66 U. Chi. L. Rev. 781, 782, 785 (1999) ("the Code recognizes that the rights and duties of contracting parties can be derived not solely from specified authoritative static forms, most notably the text of the bargain, but also from the dynamic, legally unformulated, fact patterns of common life"; nevertheless Ben-Shahar suggests that "the type of flexibility that the Code potentially promotes" will, because of factors like imperfect information and the randomness and imprecision of adjudication, often "make contractual parties worse off").

[105] Cf. Steven J. Burton, Elements of Contract Interpretation 44 (2009).

"intention" *is.* We are never, after all, concerned about the viewpoint of the "reasonable fly on the wall."[106]

More broadly: In every long-term arrangement there are, in the immortal words of Donald Rumsfeld, known unknowns (suggesting the need for flexibility and adaptation in contract administration), and unknown unknowns (where the state of the world turns out somewhat differently from what we had taken for granted): But in either case---underlying both---the parties are likely to have shared certain tacit assumptions with respect to the nature of their common enterprise, and with respect to the scope of their cooperative venture. To inquire into these, leads us to an assessment of the ambit of the risks each party has undertaken.[107]

A tacit understanding with respect to the allocation of risk may for example be sought in any of *the other "dickered" terms of the deal*, for example, the agreed-upon price.[108] And merely to use *the overall framework of the agreement as a template* may make available any number of alternative devices: A total failure to agree on the conditions of financing may, for example, be bypassed if we imagine that the party seeking to enforce the deal is willing to concede to the other the best possible terms to which he would be entitled.[109] In all these exercises of "interpretation" we are not, that

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[106] Cf. Davis v. Davis, 175 A. 574 (Conn. 1934). Plaintiff and defendant went on an automobile ride with several young people. "It was a joyous occasion, and to add to the excitement the defendant dared the plaintiff to marry her"; "neither party intended at the time to enter into the marriage status"; held, although the ceremony had been performed by a justice of the peace---presumably an eminently reasonable man---"no real contract [was] created" and "no marriage ever came into existence."

Cf. Laurent Lévy, *L'interprétation arbitrale*, [2013] Rev. de l'arb. 861, 890 (distinguishing between an arbitrator's tendency to treat the matter from the point of view of the drafting parties themselves (attempting, in other words, to discover what it is that "they had meant to say"), and a judge's tendency to interpret a text in the way that "a reasonable person (himself)" would have understood it---but recognizing that the two methods converge in practice and "generally lead to the same result").

[107] A textbook example, as you might expect, is Judge Posner's opinion in *Empire Gas Corp.,* supra n. 10. The "gap" here consisted of the question---unaddressed by the parties---of "how much is the buyer obligated to buy in a requirements contract"? The court held that the buyer's decision, for undisclosed reasons to order nothing at all, amounted to a lack of good faith---pointing to the fact that "the sudden termination of the contract midway through performance is bound to disrupt [the seller's] operations somewhat":

> The Illinois courts interpret a requirements contract as a sharing of risk between seller and buyer. The seller assumes the risk of a change in the buyer's business that makes continuation of the contract unduly costly [e.g., where there is a complete "lack of orders"], but the buyer assumes the risk of a less urgent change in his circumstances, perhaps illustrated by the facts of this case where so far as one can tell the buyer's change of mind reflected no more than a reassessment of the balance of advantages and disadvantages under the contract.

[108] See, e.g., Restatement, Second, Contracts sec. 351 cmt. f (consequential damages; " an extreme disproportion between the loss and the price charged by the party whose liability for that loss is in question" "suggests that it was not intended to cover the risk of such liability").

[109] See, e.g., Restatement, Second, Contracts § 33 Ill. 2 (where part of the purchase price was to be in cash and part "on mortgage," but the terms of the loan were not stated, "the contract is too indefinite to support a decree of specific performance against [the buyer]---but [the buyer] may obtain such a decree if he offers to pay the full

is, "guessing at the hidden but determined content of some list of meanings in the speaker's head"---rather "our concerns particularize, *render concrete, inchoate meanings*."[110] And---an overarching, but obvious point---the content of any merits-based contractual presumption with respect to *the proper allocation of risks* (no matter who performs the exercise) is a very different thing indeed from any presumption that would foreclose *the decisionmaking authority of arbitrators*.[111]

Yet a further step---barely perceptible as anything different from what has gone before---would ask us to move from "interpretation" as commonly understood to the process of filling a gap in a responsible way. The law of Contracts is of course rife with "gap fillers"---it is rather hard to see how we could function without them---and much of the UCC in fact consists of presumptions to which we necessarily default in reading an agreement, where the parties have given us no particular indications to the contrary.[112] The most common tactic is to adopt a "mimicking" principle which seeks to align what the court does with a hypothetical consent (which is why we speak of "implied terms"). The search is for those terms "the parties would have agreed upon"[113] in a completely spelled-out agreement---or perhaps[114], for the "bargain

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price in cash"); Ontario Downs, Inc. v. Lauppe, 192 Cal.App.2d 697 (2004)(parties entered into an agreement for the sale of 15.87 acres of land but did not specify *which* 15.87 acres within the seller's 450-acre lot were to be sold; held, if the buyer waived any right of selection he might have "and was willing to accept any 15.87-acre parcel, the court could require the [sellers] to select an appropriate parcel and upon [sellers'] refusal to so select, then allow [buyer] to designate a reasonable parcel"). See generally Ben-Shahar, supra n. 2 at 390, 411 (proposing that "a party who seeks enforcement of a deliberately incomplete agreement [should] be granted an option to enforce the transaction under the agreed-upon terms supplemented with terms that are the most favorable (within reason) to the defendant"; "if the parties recognize their deadlock and nevertheless draft a partial agreement, they are indicating that some assent has been obtained," and the remaining gap could be "decoupled" from the agreed-upon terms, allowing each party "to enforce upon her opponent a deal that, with respect to the contested issues, includes the opponent's favored terms").

[110] Fried supra n.3 at 60 ("so when a person refers to all the even numbers between 10 and 1000, he intends to refer also to the number 946, although that number may not figure explicitly on some list in his head").

[111] But cf. Berger, supra n. 40 at 8 ("the presumption of the professional competence of the parties to international business contracts" leads to a "yardstick" that "it is up to the parties to take precautions in their contract against unforeseen circumstances"; thus "in the absence of a special clause in the contract, the parties have indicated that the principle of sanctity of contracts shall prevail" so that "the risks of changed circumstances or discovery of gaps" is to be "borne by the parties"; "since the parties do not want an arbitration of that kind, adaption and supplementation may not be imposed on them by the arbitrators").

[112] *See* Rau, *"Separability," supra* note 13, at 29 n.71 ("sales law consists of little else but an abundant off-the-rack stock of background presumptions").

[113] Ben-Shahar, *supra* note 2, at 397 ("the mimicking theory is based on a premise that there exists an underlying 'will' or hypothetical consent," or more precisely, that there are "specific definitive terms that the parties would have rationally agreed upon had they paid sufficient attention to the matter"); see also Clayton P. Gillette, Cooperation and Convention in Contractual Defaults, 3 S. Cal. Interdisc. L.J. 167, 170-71 (1993) ("a default rule concerning risk of loss may reflect the objective that the parties would have achieved had they bargained fully about the matter, while allowing [them] to save the costs of achieving that bargain").

that most similarly situated parties would have chosen,[115] or that it would be rational for such parties to have chosen *ex ante.*"[116]

I say this is a "barely perceptible" step because quite often, it is not acknowledged---or perhaps even realized---that a conscious choice of a default rule is being made.[117] Conventional commentary may insist on a doctrinal separation between mere questions of "interpretation"--- necessarily focused on the search for the appropriate "intent"---and exercises in "gap filling"[118]---but after all, this is unlikely to be a stable or workable distinction,[119] and conceptualism should not prevent us from appreciating that "gap filling" is equally "interpretive"---*precisely to the extent that it represents an effort "to determine how the parties would have resolved the issue that has arisen had they foreseen it when they negotiated their contract*."[120] Conversely, given that there is often no true "intention" one way or the other, courts in a sense "make" contracts for the parties "almost every time they

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[114] "if the judicial task of identifying the hypothetical consent is more difficult, in light of the heterogeneity of contracting parties and the uncertainty concerning the circumstances," Ben-Shahar, supra n. 2 at 398.

[115] See also Lévy, supra n. 106 at 889 ("the views that people with characteristics similar to those of the parties in the suit, and placed in analogous circumstances, would have shared").

[116] Rau & Sherman, supra note 48, at 115.

[117] See the discussion at note 48 supra.

[118] *See, e.g.,* Margaret N. Kniffin, 5 Corbin on Contracts § 24.3 (rev. ed. 1998) (a court's action in filling a gap "with respect to a matter which the parties did not have in contemplation and concerning which they therefore had no intention" "may be called construction" but "should not be called interpretation").

[119] The theme, in other words, is that "*gap filling*" and a *semantic inquiry into "meaning*" are both at bottom "interpretive"; see Posner, supra n. 4 at 1586, 1589 (both "interpretive in the sense that they are efforts to determine how the parties would have resolved the issue that has arisen had they foreseen it when they negotiated their contract"; "disambiguation" cases "could be turned into 'gap' cases by redefining 'gap' to mean not just the omission of a term but a gap in meaning because the term the parties included is unclear with reference to the particular contingency that has materialized").

Cf. Restatement, Second, Contracts § 204 cmt. a. ("the supplying of an omitted term is not technically interpretation, but the two are closely related"); *id*. cmt. c. (where there is "a common tacit assumption" or where "a term can be supplied by logical deduction from agreed terms and the circumstances," then "interpretation may be enough"; nonetheless "the supplying of an omitted term is not within the definition of interpretation"). Since "bargaining in the presence of known default rules can hardly be deemed nonconsensual" [see n. 14 supra], I really don't know whether entering into a contract of sale with an open price term, in full awareness of UCC § 2-305, calls for an exercise of "interpretation of intent" or of "gap filling." See also Randy E. Barnett, The Sound of Silence: Default Rules and Contractual Consent, 78 Va. L. Rev. 821, 827, 909 (1992) (when "default rules are chosen to reflect the commonsense or conventional understanding of most parties," "enforcement may still be justified on the grounds of consent"; "abstract methods of analysis are simply presumptive surrogates for evidence of actual meaning").

[120] *See* Posner, *supra* note 4, at 1586; *see also* Eyal Zamir, The Inverted Hierarchy of Contract Interpretation and Supplementation, 97 Colum. L. Rev. 1710, 1719 (1997) ("when courts determine the meaning of a contract, they frequently resort to several sources at the same time," making the supposed distinction between interpretation of the contract and supplementation (or "gap filling"), "problematic"); *cf*. Eric A. Posner, There Are No Penalty Default Rules in Contract Law, 33 Fla. St. U. L. Rev. 563, 579 (2006) ("one might plausibly argue that interpretive presumptions are analytically the same as default rules even if they are placed in a separate doctrinal category").

resolve an issue of contract interpretation" under the guise of deciphering the text:[121] Both ambiguous and omitted terms can be recharacterized simply as terms that have failed to "fully specify obligations."[122]

From here there is often one further, small, but significant step. A default rule that purports to mimic a hypothetical transaction may not after all make a great deal of sense once one concedes that really, there has been no agreement whatever with respect to the missing term.[123] As a consequence courts may think it best to bypass the exercise entirely---foregoing any pretense of conjecture about the bargaining process, or any attempt to reconstruct what the parties "would have chosen"---in favor of bringing to the surface what was probably latent all along: They may, in other words, proceed directly to select the solution which appears most economically efficient, or perhaps proceed to apply "a term which comports with community standards of fairness and policy."[124] When courts act in this way, they are still

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[121] Hamilton, Rau, & Weintraub, supra n. 7 at 366-67.

Professor Nicklisch arrives, I think, at this conclusion---comes to realize it, it seems, almost in spite of himself---in Fritz Nicklisch, Agreement to Arbitrate to Fill Contractual Gaps, 5 J. Int'l Arb. 35, 41 (1988). He writes there that a "course is often taken" to "regulate," "in the wording of the contract," "almost all areas and conceivable situations, using blanket clauses to cover those which are not foreseeable"---and in such a case an arbitral tribunal would not be "faced with the task of gap-filling, but rather with that of interpreting and applying the contractual regulations in an equitable manner." But of course, he ends with the---fairly obvious---recognition that "materially speaking the concretization of blanket clauses is very near to gap-filling in the fuller sense."

[122] Posner, supra note 120, at 579.

At oral argument in *Stolt-Nielsen*, Justice Breyer posed this hypothetical:

> Imagine a worker who says: I have a right, permission, it's permissible for me to eat lunch next to the machine. The employer says no. . . . So the arbitrator or the judge reads the words [of the contract]. Nothing. . . Then the judge or the arbitrator reads the rest of the contract. Hasn't a clue. Then the arbitrator or the judge goes and looks and sees: "What's practice around here?. . . Then they might look to what happens in the rest of the industry.

Stolt-Nielsen, Oral Argument, *supra* 3, 2009 WL 4662509 at *40.

It is obvious that in adjudicating such a case, whether one:

- looks at course of performance and custom and usage, or
- asks what seems most consistent otherwise with the overall structure of the agreement, or
- seeks to determine what is most likely to be consistent with the usual background presumption of employer control of physical arrangements in the workplace —

all will call for conducting a similar analysis and will tend to lead to a similar result.

It is striking that Justice Breyer doesn't stop there but continues: "Then they might look to what happens in foreign countries with comparable industries. Then they might look to public policy. They might look almost to anything under the sun they think is relevant." All of this goes to "*what, objectively read, those words in the contract mean.*"

[123] *Cf.* Ben-Shahar, *supra* note 2, at 391-92, 414 (the premise that "a mutual will of the parties exists" is "problematic in incomplete contracts," and amounts to a "pure fiction").

[124] Restatement, Second, Contracts § 204 *cmt. d (*"where there is in fact no agreement, the court should supply a term which comports with community standards of fairness and policy rather than analyze a hypothetical model of the bargaining process"); see also id. at § 351 *cmt. f* (consequential damages; "the fact that the parties did not attempt to delineate with precision all of the risks justifies a court in attempting to allocate them

remaining faithful to their usual role in formulating rules of general application---they are hardly at large, purporting to act as *amiables compositeurs*---nor could that be said of arbitrators who might follow their example. For we can be pretty confident that a bluff and straightforward attempt to "supply" a term which is simply "reasonable in the circumstances"[125] is not likely to stray too far from what at the very least were the tacit assumptions of the contracting parties underlying the deal.[126] Still, normative concerns will in any event ineluctably play a role here, and a court which has no particular interest in camouflaging the route to its conclusion may well appeal to them explicitly.[127] Any number of default rules in our law of arbitration can already be understood in precisely this way.[128]

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fairly"); *cf*. Zamir, supra note 120, at 1754 ("the judicial process of recognizing and developing 'implied terms' ordinarily produces rules that conform to prevailing conceptions of what is just, reasonable, and efficient in contractual relations"); Nicholas R. Weiskopf, Wood v. Lucy: The Overlap between Interpretation and Gap-Filling to Achieve Minimum Decencies, 28 Pace L. Rev. 219, 226-27 (2008) ("the exhaustion of all interpretive steps is not needed to create a 'gap' designed to leave room for mandated observance of perceived minimum decencies in the course of performance")..

[125] Restatement, Second, Contracts § 204.

[126] *See, e.g.*, Richard A. Epstein, Beyond Foreseeability: Consequential Damages in the Law of Contract, 18 J. Legal Stud. 105, 106 (1989) ("what rational parties would have agreed to is . . . strong evidence of what these parties did, in fact, agree to where there is silence or ambiguity"; there is accordingly "a complete congruence between the 'efficient' identification of the proper contract terms and honoring what the parties did, or would have agreed to do, under contract").

[127] *Cf*. David Charny, Hypothetical Bargains: The Normative Structure of Contract Interpretation, 89 Mich. L. Rev. 1815, 1875-77 (1991) (in the case of two unmarried persons living together, a court found "the existence of an agreement for property to be owned jointly"; this "strategy of imaginative reconstruction" – or in an alternative formulation, this "implicit paternalism" – might be justified on the ground that it "may help to change social attitudes about duties of men and women living in intimate relationships"; "the judicial standard of fair conduct may be one that persons will defer to").

[128] For example, the time-honored doctrine of "separability," and our "presumption of arbitrability" [the former is fairly to understand as just an aspect of the latter, an included case], are both probably best viewed as *majoritarian defaults* that imputes to contracting parties a preference for "one- stop adjudication"; *see* Rau, *"Separability,"* supra note 13, at 115-16 ("inevitably more economical, and thus likely to have been desired by both parties *ex ante*"; in addition, "questions of scope and questions going 'to the merits' are often so intertwined that we can expect similar arbitral competence to be relevant, and similar factual considerations to come into play"). At the same time, though, they might be thought to reflect *a federal policy preference* in favor of directing disputed issues to alternative fora. *See, e.g.*, Roadway Package System, Inc. v. Kayser, 257 F.3d 287, 296-97 (3d Cir. 2001) ("any default rule is doomed to be inaccurate in some cases," but in light of the FAA's "*raison d'êtr*e," it is worse to "wrongly conclud[e] that parties intended to opt out" of the FAA's standards of review, than to "wrongly conclud[e] that they did not").

Either way, the methodology – which is impeccable – has particular resonance for the cases we are discussing here. I say the methodology is "impeccable" because in any concrete case, as a response to a particular question, it supplies a presumptively applicable term on the basis either of

- an assessment of presumed intent, or
- an instrumental exercise of state policy.

The *Prima Paint* inquiry in particular has become so routine, so mechanical, so much a question of second nature to us, that we rarely notice the process we are going through:. To courts, attorneys, and academics

So to review the bidding: Default rules in adjudication can be crafted by the decision-maker as an attempt to "mimic" the contracting parties' hypothetical bargain, or to track their tacit assumptions---or such rules can be crafted, more simply and directly, in overt response to concerns of efficiency and fair play. But none of this---despite the suggestion of the Court---is remotely akin to suggesting that "mere silence" can itself "*constitute consent* " to class-wide proceedings:[129] That of course is not what the arbitrators did, nor is it what any reasonable arbitrator would do.

Now having reached this point, we pause and look around and find ourselves pretty clearly now in the realm of what would normally be termed, not "interpretation,"[130] but "construction."[131] Nevertheless skepticism about the coherence, or stability, or utility, of any supposed dichotomy between the two seems abundantly justified, and growing---whether it involves reading a will,[132] or even a constitution.[133] With respect

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alike, *Prima Paint* does not really seem to be just a "presumption"—still less does it seem to be an individualized factual inquiry—it rather has the feel of a "doctrine," a "rule of law. But *Prima Paint* is in fact nothing but an "unremarkable and eminently sensible" *default rule "with respect to the likely boundaries of contractual consent," a "working presumption" that contracting* the parties did indeed wish the matter of contractual validity to be entrusted to arbitrators. This rule of thumb in the absence of explicit articulation, this allocation of the burden of proof, is no more a "fiction" than is our usual assumption that a seller has promised to deliver merchantable goods."

As a device allowing a court to "fill gaps" in the absence of an "agreement," a default rule is necessarily – at the same time – a presumption that allocates between the parties the burden of persuasion as to whether a particular term was included in the deal. And in assigning burdens in litigation, it is certainly a familiar enough phenomenon to see the choice made largely in the interest of handicapping a contention that happens to be socially disfavored. See, e.g., Edward W. Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 Stan. L. Rev. 5, 11 (1959) (while "policy more obviously predominates at the stage of determining what elements are material, its influence may nevertheless extend into the stage of allocating those elements by way of favoring one or the other party to a particular kind of litigation"); Marshall S. Sprunge, Note, Taking Sides: The Burden of Proof Switch in Dolan v. City of Tigard, 71 N.Y.U. L. Rev. 1301, 1309-10 (1996)(this rationale "reveals the link between the procedural device of the burden of proof and substantive legal concerns"; for example, "since some judges disliked that a negligent defendant could escape liability merely on the fortuity that a plaintiff had also been negligent, they assigned to the defendant the burden of proving contributory negligence").

[129] *Stolt-Nielsen*, 130 S. Ct. at 1776.

[130] See Horan v. Danton, 2005 WL 189733 (D. Del. 2005), *aff'd in part and vacated in part,* 2006 WL 859042 (3d Cir.2006)(" When a court engages in 'interpretation of language,' it determines what ideas the language induces in other persons").

[131] See id. ("When a court engages in 'construction of the contract,' it determines the contract's legal operation - that is, its effect upon the action of courts and administrative officials").

[132] See Richard F. Storrow, Judicial Discretion and the Disappearing Distinction between Will Interpretation and Construction, 56 Case Western Res. L. Rev. 65, 82-83 (2005)(the ALI "has decided that will interpretation and will construction are not discrete parts of a sequential process but are, in fact, simply components of a single process known as construction").

[133] See, e.g., Laura A. Cisneros, The Constitutional Interpretation/Construction Distinction: A Useful Fiction, 27 Constitutional Commentary 71, 75, 80 (2010)(any line between the two is "artificial, as it defies all practical attempts to draw it consistently from case to case," and, "as an aid to the practice of judging," "unhelpful").

to the reading of a contract – our particular concern – the two are routinely conflated.[134] And in any event it has never been thought that a court was foreclosed from going down this path; in all the cases I have mentioned there is a "gap" in the simple and straightforward sense that a conceded "contract" has failed to specify a result in all possible future states of the world.

So, at just what moment---just where in this gradual series of moves---are *arbitrators* now to be told to stop and to go no further? Note that the strategy of the Court in *Stolt-Nielsen* is to

- purport, somewhat disingenuously, to notice a supposed "stipulation" respecting a failure of "agreement"---and then

- to choose to draw the line right there---allowing a tribunal to go no further, on the ground that doing anything more---ordering classwide proceedings in the absence of some "*contractual basis*"---would be to "impose *its own conception of sound policy*."[135]

This amounts to imposing on our law of arbitration an extraordinarily confined view of adjudication:

- For one thing, as we have just seen, no designated "contract reader"

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[134] See Corbin on Contracts, supra note 118, § 24.3 at 11 (the "overwhelmingly common practice" of courts is to use these terms "interchangeabl[y]").

At most, perhaps, one might stake out some relevance for the distinction in the claim that "construction" (alone) is to be deemed a matter of "law" – if only in the precise sense that exercises in "construction" (alone), when engaged in by lower courts, are to be subject to a heightened standard of review on appeal; see *Horan*, supra n. 130 ("Questions of contract interpretation are reviewed according to the clearly erroneous standard, while questions of contract construction are reviewed *de novo";* nevertheless in this case, involving an "unambiguous written contract," it does not matter whether the Bankruptcy Court 'construed' or 'interpreted' the agreement, as under Delaware law "construction and/or interpretation" of such a contract "is a question of law").

However doubtful we must be as to whether any of this is particularly manageable---for in disputes that turn on the meaning of a contract, questions of "fact" and "law" will be after all inextricably intertwined – it is very hard to see any purchase at all for such a notion in the context of attempts to vacate an award. The critical point is that an arbitration agreement makes arbitral tribunals plenary judges of fact and law without any sort of review remotely reminiscent of that exercised over a hierarchically inferior court; see S.A. Wenger & Co., Inc. v. Propper Silk Hosiery Mills, 146 N.E. 203 (N.Y.1924)("Traders may prefer the decision of the arbitral tribunal to that of the courts" on "difficult questions of law as well as of fact"). The very fact that Americans (alone in the world) have to live with the civil jury---which after all sets the gold standard for unprincipled decision-making---may perhaps explain why we can be so tolerant of, and comfortable with, departures from legal norms in an arbitral process to which the parties have voluntarily submitted. For well over a century the cases have been full of reminders to the effect that "if an arbitrator makes a mistake either as to law or fact, it is the misfortune of the party and there is no help for it," Patton v. Garrett, 21 S.E. 679, 682-83 (N.C. 1895).

[135] *Stolt-Nielsen,* 130 S. Ct. 1769, 1776 fn. 10.

operates this way.

- For another, it is entirely ahistorical to insist on a constricted authority---not on the part of a lower court, but of an arbitral tribunal set in motion as the agent of the contracting parties---to fill gaps in an incomplete "non-agreement."[136]

That takes us, then, to what is for my money the most mystifying sentence to be found in any opinion ever written by the Supreme Court on the subject of arbitration: The award must be vacated, Justice Alito writes, because "the panel proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation."[137] But if an arbitral tribunal is really instructed to stop well short of all the usual work of construction that a common-law court would be expected to perform, then the resulting tension between our notions of arbitral and judicial adjudication becomes manifest.

The Court's remark that the arbitral tribunal had "exceeded its powers" by simply "impos[ing] its view of sound policy," quickly gave rise to a vast amount of free-ranging speculation---much of which, it seems to me, misses the mark.[138] The Court could

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[136] In fact the Uniform Arbitration Act has long warned that "the fact that the relief [granted by arbitrators] was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award." Unif. Arb. Act § 12(a) (1955); see also Revised Unif. Arb. Act § 21(c) (2000). There are a number of possible implications of this language. Among other things, the text has been invoked to buttress our understanding that arbitral awards need not in substance track the course of official jurisprudence. At the same time it also serves to remind us that whatever policies underlie the traditional refusal of courts to take upon themselves the task of salvaging an excessively indefinite "agreement to agree," they have no particular relevance when the parties were content to have an arbitral tribunal do so. We don't, in other words, and quite properly so, go in much here for any notion of "synchronized competences." See also text accompanying nn. 25-31, 37-41 supra.

[137] *Stolt-Nielsen,* 130 S. Ct. at 1769.

[138] E.g., S.I. Strong, Does Class Arbitration "Change the Nature" of Arbitration? *Stolt-Nielsen, AT&T,* and a Return to First Principles, 17 Harv. Negot. L. Rev. 201, 240 (2012)(the Court's language seems "odd," given that in cases like *Mitsubishi* the Court "has indicated that the failure to consider relevant public policies can lead to the overturning of an award"); Margaret Moses, *Did the U.S. Supreme Court, in its* Stolt-Niesen [sic] *Decision, Make it Easier for Courts to Vacate Arbitration Awards?*, available at http://kluwerarbitrationblog.com/blog/2010/12/14/did-the-u-s- supreme-court-in-its-stolt-niesen-decision-make-it-easier-for-courts-to-vacate-arbitration- awards (the Court's decision is "unusual and without precedent," since FAA § 10(a)(4) "has never previously been interpreted as meaning that if arbitrators consider public policy, they have exceeded their powers"); Christopher R. Drahozal & Peter B. Rutledge, Contract and Procedure, 94 Marquette L. Rev. 1103, 1155 (2011). 1148 n.159 (if the "rationale" of *Stolt-Nielsen* is "that arbitrators lack the authority of common law courts to make decisions on the basis of public policy," does this suggest that parties by agreeing to arbitration might "be forgoing substantive rights" despite declarations to the contrary in cases like *Mitsubishi*?); Gerald Aksen, The Short Life of International Class Arbitration in the USA, *in* Liber Amicorum en l'honneur de Serge Lazareff 47, 52 (Laurent Lévy et al. eds., 2011) (*Stolt-Nielsen* "casts doubt

hardly have intended to suggest anything at all that would in the slightest call into question the power of arbitrators to adjudicate claims implicating the "public interest": For arbitrators may and indeed must decide questions of mandatory law in fidelity to the choice of the parties---once made---to entrust such matters to them. Nor, when the majority reminds us that arbitrators do not sit to "dispense [their] own brand of industrial justice," could it be thought that they were suddenly reaching out to appropriate some alien doctrine of review peculiar to our collective bargaining jurisprudence.[139]

No, I would think that what the Court was trying to say was undoubtedly much simpler---and it was even, marginally, to the point:[140] It seems that the intention was merely to invoke a conventional trope that has long been familiar to our law of arbitration---to the effect that what will provoke vacatur, is the arbitrator's frolic, his "flights of fancy"[141]---for this and only this "lies outside the perimeter of agreement." The "critical distinction" then has always been "between the arbitrators' imperfect ability to carry out the task entrusted to them, and their simple failure even to try."[142] That the award must in this sense "draw its essence" from the parties' agreement may seem a curious formulation, but it is also curiously satisfying, and manages to get the idea across quite adequately: And this is really all that "excess of power" (or

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regarding who decides 'public policy' issues," which is "particularly troubling---arbitrators decide questions of sound policy all the time"; while the New York Convention "allows a public policy defense in award review, here the decision arguably holds that the question does not even fall under the scope of a broad arbitration clause").

[139] *Cf*. Thomas J. Stipanowich, The Third Arbitration Trilogy: *Stolt-Nielsen, Rent-A-Center, Concepcion* and the Future of American Arbitration, 22 Amer. Rev. Int'l Arb. 323, 342 n.107 (2011) (the *Stolt-Nielsen* majority "borrowed, for the first time in a commercial arbitration decision by the Court, and somewhat anachronistically, [this] maxim from the collective bargaining realm," and so this "principle of labor arbitration must now be regarded as a part of the law surrounding FAA Section 10(a)(4)"); Moses, *supra* note 138 ("the Court drew upon a standard from labor arbitration rather than from commercial arbitration"; this "labor arbitration standard" "does not appear to be very different from a finding that the arbitrator improperly applied the law").

[140] Not the least of the "literary offenses of James Fenimore Cooper," in Mark Twain's delightful account, is that the conversations of Cooper's characters "consisted mainly of irrelevancies"---but "with here and there a relevancy, a relevancy with an embarrassed look, as not being able to explain how it got there." The essay is in Kenneth S. Lynn (ed.), The Comic Tradition in America 328, 338 (1958).

[141] Advest, Inc. v. McCarthy, 914 F.2d 6, 10 (1st Cir. 1990).

[142] Rau, *The Culture of American Arbitration*, supra n. 26 at 531.

To the same effect – although using the conventional language of "interpretation" – is Hill v. Norfolk and Western Ry. Co., 814 F.2d 1192, 1194-95 (7th Cir.1987)(Posner, J.) (the question "is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract"; a party can only complain if the arbitrators "disregard the contract and implement their own notions of what is reasonable and fair"); Wise v. Wachovia Securities, LLC 450 F.3d 265, 269 (7th Cir. 2006)(Posner, J.)("the issue for the court is not whether the contract interpretation is incorrect or even wacky but whether the arbitrators had failed to interpret the contract at all, for only then were they exceeding the authority granted to them").

"manifest disregard," for that matter) comes down to.[143]

Nevertheless: mere adjudication in the face of a lack of agreement is hardly tantamount to proscribed "faithlessness"---not as long as it remains within the authority of the parties' chosen arbitrators to devise appropriate default rules to help them construe the contract. It is only the arbitrator's failure to proceed as instructed[144]---or the defiance of some contractual mandate limiting his mission[145]---perhaps indeed to the point of saying, "to hell with" the applicable law[146]---that begins to endanger the paramount value of private autonomy. If there are indeed any outer "boundaries" to the process of construction, they are here.

In the very same sentence as its extraordinary rebuke of the arbitral tribunal for having "proceeded as if it had the authority of a common-law court to develop what it

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[143] The canonical "draws its essence" formula originated of course in the first, "*Steelworkers*" "trilogy," United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)("an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement"). But among the many non-labor cases that have since found it to be helpful, going back to the time immediately following *Steelworkers,* see San Martine Compania de Navegacion, S.A. v. Saguenay Terminals Ltd., 293 F.2d 796, 801 (9th Cir. 1961)(charter party; "manifest disregard" "is the sort of thing the Court had in mind" in its language in *Steelworkers*); Bosack v. Soward. 586 F.3d 1096 (9th Cir. 2009)(claim of breach of fiduciary duty against former investment manager and general partner; arbitrators "exceed their powers" when they express a "manifest disregard of law," or when they issue an award that is "completely irrational" – and an award is "completely irrational" where it "fails to draw its essence from the agreement"); Hoffman v. Cargill Inc., 236 F.3d 458, 461-62 (8th Cir. 2001) (proper price for delivered corn; "an award will only be set aside where it is completely irrational or evidences a manifest disregard for the law," and it "may only be said to be irrational where it fails to draw its essence from the agreement").

[144] Rau, *The Culture of American Arbitration*, supra n. 26 at 531 ("suppose that an arbitrator has been entrusted with the task of valuing a party's shares in a close corporation, and that he has been told to value the business 'as a going concern in the light of past, present and prospective future earnings and the net worth of said business'"; however, "it can be shown that he did not even bother to obtain any operating figures or net earnings for the previous five years, and that he did not capitalize prospective earnings").

[145] *E.g.*, *Roadway Package System, Inc*., supra n. 128 (arbitrator was asked to determine "whether the termination of [an independent contractor] was within the terms of this Agreement," but he instead framed the question as "whether the termination was wrongful or proper," and his award "makes crystal clear that [his] decision was based on the fact that he thought [the respondent's] procedures for notifying [claimant] of its dissatisfaction with his performance were unfair"; the arbitrator thus "ruled on an issue that was not properly before him").

[146] *See*, *e.g.*, Edstrom Industries, Inc. v. Companion Life Ins. Co., 516 F.3d 546, 553 (7th Cir. 2008)(Posner, J.); *see also id*. at 552 ("if they tell him to apply Wisconsin law, he cannot apply New York law"). The arbitrator in *Edstrom* did not actually go quite so far---but although the contract directed that he "strictly apply Wisconsin law," it appeared to the court that "he seems not to have interpreted it at all but merely to have ignored it"---"it is unrealistic to think that the arbitrator was even *trying* to interpret Wisconsin law." (emphasis in original) So the award was vacated. *See also* N.Y. Tel. Co. v. Communications Workers of Amer., 256 F.3d 89 (2d Cir. 2001)("perhaps," the arbitrator had written, "it is time for a new court decision").

viewed as the best rule," the *Stolt-Nielsen* Court faulted the tribunal for failing to "[inquire] whether the FAA, maritime law, or New York law contains a 'default rule' under which an arbitration clause is construed as allowing class arbitration in the absence of express consent."[147] Such a "default rule," as we have seen, can indeed be found in the law of a number of jurisdictions, such as South Carolina---although of course in those jurisdictions the "rule" will only surface *in circumstances where it is assumed that the decision is to be made in the first place, not by an arbitral tribunal, but instead by a court.*[148]

- Now the implication that the arbitrators were somehow obligated to expressly "identify" and articulate the basis of their award[149]---and that we are not permitted to deduce one circumstantially from the award itself---is surprising to begin with.[150]

- A further implication is more startling still---that if some textual hook, some "contractual basis" or "interpretive path," can't be found---then the arbitrators, in the absence of any well-established judicial "default rule," will be powerless to spin out one of their own. It is almost as if arbitrators were to be placed in a position analogous to federal courts in diversity cases, bound when embarking on an *Erie* exercise to defer to state law---but then, even so, federal courts in such circumstances are not really expected to shut down the process and turn off the lights should they be unable to identify a state-court rule of decision.

- And finally---and even more strikingly---any observer must be bewildered by what this passage does not take into account: An unexceptional "default rule" is after all readily to hand, if one only takes the trouble to look for it. For a "meta-default rule" informs every feature of our law of

[147] *Stolt-Nielsen*, 130 S. Ct. at 1768-90; see also id. at 1770.
[148] *See* text accompanying n. 52 supra; cf. Rau & Sherman, supra n. 48, at 114 (statutes permitting court-ordered consolidation in the interest of efficient case administration and in the absence of a contrary agreement).
[149] *Stolt-Nielsen,* 130 S. Ct. at 1768 (because the agreement was "silent," "the arbitrators' proper task was to identify the rule of law that governs in that situation"); *id*. at 1770 ("instead of identifying and applying a rule of decision derived from the FAA or either maritime or New York law, the arbitration panel imposed its own policy choice and thus exceeded its powers").
[150] *Cf*. Robbins v. Day, 954 F.2d 679, 684 (11th Cir. 1992) (the burden is on the party seeking to overturn the award to refute "every rational basis upon which the arbitrator could have relied"); see also Rau, *The Culture of American Arbitration,* supra n. 26 at 513-14 (an arbitrator's ability to render a "naked award" may have "an important positive effect," maximizing "his freedom from overbroad rules or time-honored categories, which might otherwise appear to dictate a result he would prefer to avoid"; conversely, "any attempt to impose reasoned awards on arbitrators will be motivated at least in part by the desire to expand judicial supervision of the process").

> arbitration---I mean, of course, a background rule to the effect that by submitting to the process, the parties in cases of "silence" have presumptively entrusted *to their arbitrators* a wide-ranging power to determine just what form their proceeding will take.[151]
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> Note carefully that I have been talking here about *the broad party-delegated authority of arbitrators to give meaning to contracts and to devise appropriate default rules (whether by means of "interpretation" or "construction").* This is the only question posed---the question is therefore *not,* as the Court phrased it, "whether the parties [actually] *agreed to authorize class arbitration*,"[152] *That,* by contrast, was precisely the question posed to *the arbitral tribunal itself*. To frame the matter as the Court did is thus to conflate questions going to the merits with questions going to the identity of the appropriate decisionmaker.[153]

Here is one final test of the *Stolt-Nielsen* methodology: Suppose that an arbitrator were to issue a "clause construction award" holding that class-wide arbitration is permitted, and were to base his conclusion on a rule of applicable law to the effect that contracts are to be "construed against the drafter."[154] This *contra proferentem* canon is often marginalized as a

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[151] See Rau, "*Consent" to Arbitral Jurisdiction*, supra n. 73 at 139 (once there is "an agreement in which arbitrators have been selected and entrusted with the power to do *something,"* the inquiry then turns to "what the parties could reasonably have expected to be within the authority of 'their' arbitrators," and "at the core of any mandate would naturally be matters touching on the appearance of the process and the conduct of the hearings"); Oral Argument, *Green Tree Financial Corp. v. Bazzle*, supra n. 57, 2003 WL 1989562 at *25-*26 (Justice Scalia: "they don't consent to every jot and tittle of means by which the arbitration will be conducted; they consent in a gross kind of way to arbitration or nonarbitration, and – and that's – that's what their consent makes the difference between, but they don't consent to every consequent detail that enters into the actual conduct of the arbitration").

[152] *Stolt-Nielsen,* 1390 S. Ct. at 1776.

[153] Of course, these two concepts---of "arbitral jurisdiction," and "unreviewable arbitral discretion"---are closely related---are tightly interdependent. An arbitral exercise of power delegated by the parties to the tribunal will after all routinely command the usual degree of deference that is extended to *any* decision "on the merits"---or at the very least will be subject to a judicial control substantially less intrusive than *de novo* review. Conversely, that a given outcome will be clearly illegitimate in arbitration, must cast considerable doubt on the willingness of the parties to entrust the matter to the arbitrator in the first place; see text accompanying nn. 170-174 infra. Still, the two represent separate analytic problems that should not be muddled.

Naturally, though, the distinction is not universally observed. See also the discussion at n. 68 supra. For a mature attempt to grapple with it, see Oral Argument, Oxford Health Plans LLC v. Florida, 2013 WL 1193215 (March 25, 2013) at *21 (Justice Sotomayor: "I used to think that exceeding your powers was deciding an issue the parties hadn't agreed to arbitrate, but here you've conceded that you gave the issue to the arbitrator . . . So what instead you're saying is that 'exceeded your powers' means that an error the arbitrator makes has to be of what quality?").

[154] Genus Credit Management Corp. v. Jones, 2006 WL 905936, at *1-*3 (D. Md. Apr. 6, 2006)(arbitrator determined that the agreement "was ambiguous as to class arbitration and should be interpreted against the drafter"; held, "it cannot be argued in any respect – as is plaintiff's burden – that [the arbitrator's] interpretation fails to draw its essence from the contract").

technique of construction "of last resort"[155]: Still it may do occasional useful service as a "penalty default" – setting the baseline *not at all at what the parties "probably wanted" (or "would have wanted"),* but precisely at what they would have wished to *avoid*---in the interest of discouraging strategic behavior, creating incentives for the more knowledgeable party to draft more explicitly in order to contract around the default.[156] And "interpreting" a contract against the drafter can above all serve an openly redistributive function, correcting for "an imbalance in the fairness of the exchange."[157] "It is chiefly a rule of policy, generally favoring the underdog."[158] *The one thing that this "rule" is not, clearly, is an interpretive guide aimed at ferreting out what the true "intention" or "meaning" of the parties truly was.* (If there *was* any "intention" at all, surely we can attribute to the drafting party the will to draft in a way as favorable as possible to *himself*?) While it remains commonplace for *courts* to conjure up notions of *contra proferentem,* are we now, after *Stolt-Nielsen,* to conclude that this can no longer be part of the tool box of the arbitral "contract reader"?

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[155] *E.g.*, Empire Rubber Mfg. Co. v. Morris, 65 A. 450, 453 (N.J. Err. & App.1906)("it is the last to be resorted to---a rule never to be relied upon except where other rules of construction fail").

One could realistically go somewhat further and suggest that it serves most often as little more than a makeweight, wheeled out to bolster a result already reached and chosen for more functional purposes. This seems exemplified by Mastrobuono v.Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995)(the strong "federal policy favoring arbitration" requires that arbitration agreements be "generously construed," and this requires "an unequivocal exclusion" of punitive damages; "moreover, respondents cannot overcome the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it").

[156] The *locus classicus* is Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 Yale L.J. 87 (1989). On understanding *Hadley v. Baxendale* through this optic, *see id*. at 101-04 (the *Hadley* default can "be understood as a purposeful inducement to the miller as the more informed party to reveal that information to the carrier," which "creates value because if the carrier foresees the loss, he will be able to prevent it more efficiently"). On understanding *contra proferentem* through this optic, see Harnischfeger Corp. v. Harbor Ins. Co., 927 F.2d 974, 976 (7th Cir. 1991)(Easterbrook, J.), and Ben-Shahar, supra n. 2 at 391, 398.

[157] Burton, supra note 105 at 188.

[158] Corbin on Contracts, supra n. 118 at 306. See also Restatement, Second, Contracts § 206 cmt. a. (the drafting party is "more likely than the other party to have reason to know of uncertainties of meaning" and may indeed "leave meaning deliberately obscure"; "sometimes the result is hard to distinguish from a denial of effect to an unconscionable clause"); Zamir, *supra* note 120, at 1724-25 ("this established rule may be justified on grounds of personal responsibility, fairness, efficiency and redistribution"; "some of these ends, like the reallocation of power and wealth between the parties, represent distinctively social values").

Professor Horton has suggested an alternative rationale---that "the doctrine is better understood as encouraging uniformity of meaning in mass produced contracts," allowing firms to "reap the benefits of standardization" and consumers to "pay a price that reflects these savings"; without it, standardized terms would "mean different things to different consumers---a result that would tear the fabric of contract law." David Horton, Flipping the Script: Contra Proferentem and Standard Form Contracts, 80 U. Colo. L. Rev. 431, 438, 474 (2009). Whatever the merits of this approach it will be noted that it does not, any more than traditional notions, rest on any attempt to ascertain true "intention."

b. "Only One Possible Outcome on the Facts Before Us"

So one view of *Stolt-Nielsen,* then, is that it represents a censure of the arbitral tribunal for presuming to go about deciding the case *in the way it did*: If all that the award amounted to, was the arbitrators' attempt to "impose [their] own view of sound policy," then it seemed to follow that the requisite "contractual basis" for the award must be missing. This, as we have seen, has extremely troubling implications that extend far beyond the factual matrix of the case – implications for the way in which arbitrators are now to be expected to do their work of contract "construction," and implications for the way in which courts may now respond to demands for annulment. It does not seem too much to say that this analysis calls into question our traditional view of arbitration as an alternative forum for adjudication.

There is another way of looking at the holding, however, this somewhat more "substantive": It is that on the facts before the tribunal---and indeed on any view of the case---any award that would permit class-wide proceedings would be forever illegitimate. The starting point here is that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding the party *agreed* to do so."[159] So the parties' supposed "stipulation" must mean precisely that the requisite affirmative showing of "consent" had not been made---therefore depriving the arbitral order of the requisite "contractual basis." This is to enlist the FAA to ensure "freedom from arbitration."[160] And so on this view there was simply "no need" to send the case back to the arbitrators for a re-examination.

We need not dwell on the back story here, which is troubling enough but not our real concern today. Few legal issues are as deeply fraught for the modern U.S. Supreme Court as the question of classwide proceedings. This part of the holding is obviously responsive to the Supreme Court's predictable and result-driven agenda---captured as it has been by neo-liberal ideology and corporate interest---for it is clear enough that bilateral arbitration is valued by corporate users above all for "its promise to minimize the claim facilitating and liability effects of all aggregate litigation.[161] So in our context of the "silent" arbitration clause, the premise

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[159] *Stolt-Nielsen,* 130 S. Ct. at 1775 (emphasis in the original).

[160] See text accompanying n. 82 and n. 82 supra.

[161] See Rau, *Arbitral Power and the Limits of Contract,* supra n. 100 at 543, 527. In a case handed down one year to the day after *Stolt-Nielsen*---and relying heavily on the earlier decision---the Court held that state law may not invalidate as "unconscionable" contractual provisions in which the drafting party attempts to insist on bilateral arbitration and to exclude classwide proceedings. The state rule, Justice Scalia wrote, would impermissibly "interfere with arbitration." And he added candidly that:

> [C]lass arbitration greatly increases risks to defendants. . . . [W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be

from which everything follows is this---that classwide proceedings would "*change the nature of arbitration* to such a degree that it cannot be presumed that the parties consented to it"---that is, the tribunal cannot be allowed to order it---merely because the underlying dispute is subject to arbitration.

a. To say that an arbitral tribunal *may not "proceed as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied*" is, as we have seen, a proposition that in the normal run of cases is simply unthinkable---but such a remark can perhaps be marginalized by how it plays out in context here: The Court is in fact saying that once the parties cannot be shown to have affirmatively agreed to classwide proceedings, a new and overriding federal "default rule" comes into play---a default rule to which state law must yield and which state courts and arbitrators alike, in applying it, must honor: The technique is to spin out from the FAA a federal policy privileging party autonomy – not only to preserve the freedom to arbitrate – but equally in the interest of protecting the parties' *freedom from having to arbitrate* in any particular manner. So what will be considered to be "in accordance with the terms of the agreement" must apparently be evaluated, not by the state law of contracts, but by a federal common law grounded in § 4; to "enforce arbitration as agreed" apparently means that neither state courts nor arbitrators may not impose any form of proceeding alien to the parties' expectations. Under this "default rule" the absence of an acceptable "agreement" necessarily means that recourse to the AAA class procedures is foreclosed.[162]

b. And to say that classwide proceedings would necessarily "*change the nature of arbitration"* can also readily be misunderstood. The Court is saying nothing in particular about whether a given process "qualifies" as arbitration, or about how

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pressured into settling questionable claims. Other courts have noted the risk of "in terrorem" settlements that class actions entail, and class arbitration would be no different.

AT&T Mobility, LLC v. Concepcion, 131 S. Ct. 1740, 1752 (2011).

[162] Earlier remarks in which the Court reproached the arbitral tribunal for its failure to have considered the "New York default rule" [cf. text accompanying nn. 147-48] have to be considered disingenuous (or are perhaps just a case of running up the score?)--- because

- whatever purchase state-law rules may have in informing the interpretation of contracts generally,
- they have none here.

In his decision, Justice Alito intimated strongly that federal courts even in diversity cases had no reason to defer to any contrary state-law default rule with respect to classwide proceedings, see *Stolt-Nielsen,* 130 S. Ct. at 1773 ("while the interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration is a matter of consent, not coercion").

And then there is *AT&T Mobility, LLC*, supra n. 161: If, as the Court put it there, the FAA "prohibits states" from insisting on class-wide proceedings as a condition of enforcement -- if state law to that effect is "preempted" because this would somehow denature arbitration---then "I should think it most unlikely that state courts remain free instead to 'nudge' the parties in the direction of class proceedings, by prescribing a similar 'default rule' in cases of "silence"; see Rau, *Arbitral Power and the Limits of Contract*, supra n. 100 at 484 fn. 173.

> to "define" the true "'nature' of arbitration," or about what arbitration "really" "is"[163]---an inquiry that has a conceptual, essentialist---dare I say, "Continental"---air to it. As we have seen---and thankfully--- the quest for the "true essence" of the concept of "arbitration" has not, in this country, been conducted with anything like the ingenuity and obsessiveness devoted to the task in some other legal cultures. Rather, the Court need only be taken as saying this: That the arbitrators' imposition of a class-wide proceeding,
>
> - was (a matter of degree) so far outside the scope of the probable expectations of the contracting parties, and in consequence
>
> - would (a matter of degree) so drastically alter the cost/benefit calculus of their original decision to arbitrate,

that (as a consequence) their agents should not have taken it upon themselves to do so---not, at least, without some further indicia of the parties' consent.[164]

Now this is in fact an attractive and measured argument. It has considerable appeal when we are looking at commercial parties, particularly in the maritime context in which *Stolt-Nielsen* itself arose. It also has some appeal---of a different sort, perhaps, but still real---in the context of contracts of adhesion with consumers and employees---where concededly the drafter may have had reason to be aware of the possibility of class-wide proceedings---but also, at the same time, where he had the motivation (and the probable desire) to structure the transaction in such a way as to avoid them. Whatever the systemic benefits of aggregate litigation,[165] the very fact that drafting parties will rarely arrange their affairs so as to subject themselves to class-wide liability---and can be expected, if permitted to do so, to immediately opt out of any general background rule that does carries this danger---suggests that the Court's may be a "majoritarian default." Even the notorious "stickiness" of default rules does not seem to have prevented strenuous attempts to "contract around" *Bazzle.*

The delicate point rather lies elsewhere. This new "default rule" may in the abstract

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[163] *Cf.* Strong, *supra* note 138, at 246-62 (attempting "to identify a universally acceptable definition of arbitration that can be used . . . to determine whether class arbitration does, in fact, 'change the nature of arbitration'").

[164] Among the "fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration," the court pointed to the fact that

- the arbitrator "no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties";
- under the AAA rules the :"presumption of privacy and confidentiality" no longer applies, and
- the award "no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well."

Stolt-Nielsen, 130 S. Ct. at 1776.

[165] Cf. Strong, supra n. 65, at 1048-49 (identifying the advantages of "efficiency," extending also to "unnamed claimants" and to "society as a whole," as well as of "promoting social justice").

seem sane enough. Nevertheless---however sensible it may be--- it does not come to us as mere counsel to guide the exercise of arbitral discretion---but instead, as a limitation imposed by the state from outside the system entirely, and intended to demarcate the outer boundaries of arbitral "power." It is thus remarkably blind to the considerations of context and policy that usually inform the arbitrator's process of contract construction: Apparently we are asked to accept that our practice of leaving judgments with respect to the parties' expectations in the hands of their chosen arbitrators---a conventional assumption---must now be overridden by

- the unusual nature of class-wide proceedings, coupled perhaps with
- the particularly acute danger of distortion through arbitral self-interest.

While default rules pervade so much of our law of arbitration,[166] this is their first appearance in the form of rules that are said to govern *the determinations of the arbitrators themselves, on pain of vacatur.* Indeed, one would have to invest a good deal of time and effort before being able to identify cases---which in the end amount only to a trivial number--- in which the Supreme Court has been willing to mandate or approve the annulment of an arbitral award. (And before now these have been strictly outliers, grounded either on the lack of any agreement at all,[167] or on some impropriety in the composition of the arbitral tribunal).[168] But then we come to *Stolt-Nielsen*: It can hardly be accidental that the specter of class relief in arbitration is just about the only feature of the arbitration process that has been anathema to the business community---or that this rare decision restrictive of arbitral power happens, wonder of wonders, to be one in which a corporate-oriented Court manages more or less to relieve it of any such anxiety.

The dangers this seemed to pose in breathing new vigor into the mysterious prohibition of "excess of powers"---of forcing open widely "the door of vacatur"---were obvious, and

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[166] See text accompanying nn. 128-29 supra. For other examples, see Rau, *Arbitral Power and the Limits of Contract,* supra n. 100 at fn. 168.

[167] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995)(company president argued that he had never consented in his individual capacity to allow arbitrators to determine the merits of the dispute; the Court held that he had not "submitted" this "arbitrability" challenge to the arbitrators merely by arguing the point before them).

[168] Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968).

In *Bazzle*, as we have seen, the Court did vacate a state court's confirmation of the award, but only because -- with respect to the critical question of whether class-wide proceedings were authorized -- "the parties have not yet obtained the arbitral decision that their contracts foresee"; the case was remanded "so that the arbitrator may decide the question of contract interpretation." Efforts to characterize a measure as "pro-arbitration" or "anti-arbitration" are as often as not simplistic and naive, see Alan Scott Rau, The UNCITRAL Model law in State and Federal Courts: The Case of "Waiver," 6 Amer. Rev. Int'l Arb. 223, 270-71 ("waiver"; do courts "favor" the arbitration process "by staying litigation and moving the parties into arbitration whenever they have a chance to do so? Or do they 'favor' arbitration by creating incentives for the parties to initiate the process at the earliest possible moment, rather than allowing litigation to proceed?"). But it is not seriously open to argument that *Bazzle* falls securely in the former category.

immediately perceived. [169] The risk does seem to have receded considerably in recent months, a point I will turn to in a minute when we discuss the third case in this triptych, *Oxford Health*.

Before we go further**,** though, it might be appropriate to pause for just a moment to ask what was left, after all this, of the *Bazzle* case---which had been decided after all just a few years previously. As we remember, *Bazzle* was all about reserving the question of interpretation for the tribunal---and so the validity of the actual holding there could not directly be called into question, given that in *Stolt-Nielsen* the parties' adoption of the AAA Rules had amounted instead to an *express delegation* to the arbitrators of the authority to do so.

Still, the Court in *Stolt-Nielsen* went out of its way to suggest that the premise underlying *Bazzle*---the notion that arbitrators had presumptive competence to construe a contract in order to ask whether classwide proceedings were authorized---has not survived (at least in the absence of an express delegation of the sort contained in the Rules). What else can one conclude from the Court's flat assertion that "an implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate"?[170] That it is not enough for parties to be properly before the arbitrators---that the arbitrators may not presume to order classwide proceedings in the absence of some demonstrable "consent" to the arrangement---that their mission must terminate once the lack of some "contractual basis" for the order is noted---all must cast considerable doubt on whether the matter could be properly submitted to them in the first place.[171] And all of that comes very close to saying that this issue of construction is now one where it is the *court* that is charged with monitoring entrance through the "gateway" ---a

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[169] See Stipanowich, supra note 139, at 342; Aksen, supra n. 138 at 53 (*Stolt-Nielsen* "contains enough dictums to jeopardize the finality of commercial arbitration awards in general").

[170] That is, "it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Stolt-Nielsen,* 230 S. Ct. at 1775.

[171] When Justice Ginsburg in dissent noted in passing that the issue of class-wide proceedings merely concerned "the procedural mode available for presentation of [the claimant's] antitrust claims," *Stolt-Nielsen*, 130 S. Ct. at 1781-82, she seemed to be channeling the *Howsam/Bazzle* jurisprudence under which such "procedural" questions were presumptively confided to arbitrators "well situated" to answer them. See *Bazzle*, 539 U.S. at 452 ("the question here" "does not fall into [the] narrow exception," the "limited circumstances," in which "the parties intended courts, not arbitrators, to decide a particular arbitration-related matter"; such "gateway matters" include the question "whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy," but neither is at stake here). But the *Stolt-Nielsen* majority simply brushed this aside: "If the question were that simple," wrote Justice Alito, "there would be no need to consider the parties' intent with respect to class arbitration." *Stolt-Nielsen*, 130 S. Ct. at 1776. I find that a most puzzling comment: In the first instance the relevant "intention" at stake would appear to concern *the parties' willingness to submit to an arbitral determination;* if indeed it is only the proper "procedural mode" of adjudication that is implicated, then party intention remains critical in yet a second sense---in the sense that it would then become a matter for the arbitrators themselves to go on to tell us, with the statutory degree of finality, *what the parties' manifestation of intention in their contract "means."*

conclusion made explicit in later jurisprudence[172] and one which---while rejected by the plurality in *Bazzle* itself[173]---was already adumbrated in Justice Rehnquist's dissenting opinion there.[174]

Still, it seems excessive to say flatly that as a result, ***Bazzle "***has been left with essentially no remaining effect.[175] If indeed the avoidance of class relief is the engine driving the *Stolt-Nielsen* machine, the holding might be cabined as something of a "one off"---that is, it may be seen as largely responsive to the unusual and dramatic feature of class proceedings. The Court's aversion to classwide proceedings may thus be the impetus for *Stolt-Nielsen* and, at the same time, its limiting principle.[176] And even more importantly, remember that *Bazzle*

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[172] See *AT&T Mobility, LLC*, supra n. 161 at 1751-52: Here, on its way to holding that states may not condition the enforceability of an arbitration agreement in a consumer case on the availability of class-wide relief, the Court closely tracked the argument of *Stolt-Nielsen* and went on to conclude: "We find it unlikely that in passing the FAA Congress meant to leave the disposition of [the] procedural requirements [of class arbitration] to an arbitrator"; since "arbitration is poorly suited to the higher stakes of class litigation," "we find it hard to believe that defendants would bet the company with no effective means of review."

In the lower courts, see, e.g., Chassen v. Fidelity Nat'l Financial, Inc., 2014 WL 202763 (D.N.J. 2014) (closely tracking *Stolt-Nielsen;* "the arbitration clauses are silent or ambiguous as to whether an arbitrator should determine the question of class-wide arbitrability; and that is not enough to wrest that decision from the courts," so that "there must be an actual showing of consent in order to refer a matter to class-wide arbitration"; "the Supreme Court having held that class action matters are poorly suited for arbitration, this Court finds it should determine the gateway issue of class arbitration at an evidentiary hearing focused on whether the parties did, in fact, consent to class arbitration").

[173] See nn. 56-57 supra. Of course, as the opinion in *Stolt-Nielsen* was quick to point out, *Bazzle* had only been decided by a plurality of the Court and thus "did not yield a majority decision" on this question, *Stolt-Nielsen,* 130 S. Ct. at 1172; see text accompanying n. 64 supra.

[174] See *Bazzle*, 439 U.S. at 456-57 (Rehnquist, C.J., dissenting) "the parties' agreement as to how the arbitrator should be selected is much more akin to the agreement as to what shall be arbitrated, a question for the courts under *First Options,"* than it is to questions that are "for the arbitrator under *Howsam"; "*just as fundamental to the agreement of the parties as to *what* is submitted to the arbitrator is to *whom* it is submitted")(italics in original).

[175] Christopher R. Drahozal, Error Correction and the Supreme Court's Arbitration Docket, 29 Ohio St. J. on Disp. Resol. 1, 18 (2014).

[176] For example, *Stolt-Nielsen* might plausibly be read as falling short of a prohibition of arbitral orders of consolidation: If indeed such orders do not implicate to the same degree the concerns expressed by the Court [see n. 164 supra], then *Bazzle* is left intact---that is to say, everything said in *Bazzle* with regard to the interpretative power of arbitrators in cases of "silence" still has purchase---even, I would suggest, where the parties have been naïve enough to make a "stipulation" concerning their "lack of agreement."

See, e.g., Safra Nat'l Bank of N.Y. v. Penfold Investment Trading, Ltd., 2011 WL 1672467 (S.D.N.Y.)("joinder and consolidation remain distinct procedural issues of the sort parties would intend for the arbitrator to decide"). Medicine Shoppe Int'l, Inc. v. Bill's Pills, Inc. 2012 WL 1660958 (E.D. Mo.)("whether the arbitration clause authorizes joinder is a procedural question for the arbitrator"; "while class arbitration may be included among the gateway issues for courts to decide under *Stolt–Nielsen,* "joinder and consolidation remain distinct procedural issues of the sort parties would intend for the arbitrator to decide**";** "the concerns pertaining to class arbitration do not apply to consolidation proceedings where only three claimants are asserting their individual claims in the underlying arbitration"); The Rice Co. v. Precious Flowers Ltd., 2012 WL 2006149 (S.D.N.Y.)(two arbitration proceedings arising out of a single shipment of wheat from Texas to Peru; "consolidation does not fall within the narrow exception reserved for gateway matters that the parties would likely have expected a court to resolve"; "the question of consolidation "concerns the nature of the arbitration

retains a sting in its tail: The decision there was after all the impetus for the elaborate class-arbitration mechanism contained in the AAA Rules---which contain an express delegation of authority to arbitrators---and, at least where the stronger party has not drafted around it, these continue and flourish.

3. *The Arbitrator at Large:* Oxford Health

> JUSTICE SCALIA: But . . . he has to have come to a plausible construction. It's not enough that he said, I'm construing the contract; I have looked at the terms of the contract and what the parties said, and my construction of the contract is X. That's not enough. It has to be plausible.
> MR. KATZ [counsel for the claimants]: Yes.
> JUSTICE SCALIA: Now, why is this plausible?
> MR. KATZ: Well, with all due respect, Justice Scalia, I don't think plausibility comes into play.[177]

Inevitably, in a common-law system, the matter could not rest there. Right after *Stolt-Nielsen* was decided I speculated, in print, as what might be expected to happen in the future---in a lower court

- which has been presented with a case that seems identical to *Stolt-Nielsen* in every way,
- where the parties have also both consented to an arbitral determination on whether classwide proceedings were permitted by the contract,
- where they both are making the same and inevitable arguments with respect to the text of the arbitration agreement---an agreement conventionally drafted, encompassing in "broad" language "any dispute, claim or controversy," and empowering the tribunal to award "any types of legal or equitable relief" that would be available in court---but necessarily indeterminate on the subject of class-wide proceedings,
- but where there has been no comparable stipulation by the claimant with respect to a "lack of agreement"---no concession, that is, that could be seized

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proceeding agreed to, not whether the parties agreed to arbitrate" and therefore "presumptively falls to the arbitrator").

At the very least---the bare minimum---the differences may be such as to affect the calculus of "likelihood of success on the merits" for the purpose of evaluating requests for preliminary injunctions against arbitral proceedings. E.g., Anwar v. Fairfield Greenwich Ltd., 728 F. Supp. 2d 462, 477-78 (S.D.N.Y. 2010)("only twenty-four investment accounts held by thirty-eight parties are at stake in the arbitration; the usual rules of privacy and confidentiality apply; and no parties are absent").

[177] Oral Argument, Oxford Health Plans LLC v. Florida, 2013 WL 1193215 (March 25, 2013) at *34.

> upon and exploited.[178]

One would have thought that in order to remain true to the spirit of *Stolt-Nielsen,* the inevitable conclusion was that in these circumstances, the text alone---even in the absence of any "stipulation"---would be insufficient to justify an arbitral order of classwide proceedings. This was in fact a view shared by a number of thoughtful observers.[179] But the world in fact turned out somewhat differently.

Sutter v. Oxford Health Plans was a putative class action in which primary care physicians accused a managed care network of improperly denying, underpaying, or delaying reimbursement of their claims for the provision of medical services to the plan's members. The agreement's arbitration clause provided that

> No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the Rules of [the AAA].

Immediately following the *Bazzle* case, "at a conference with the parties it was agreed that under [*Bazzle*], [the arbitrator] must determine whether the parties' Agreement allows for class action,"and "the parties . .. agreed that [the arbitrator] should proceed to make the determination"[180]---so again, as in *Stolt-Nielsen,* we can find a clear and express delegation of authority to the arbitrators.

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[178] Rau, *Arbitral Power and the Limits of Contract*, supra n. 100 at 458.

[179] See, e.g., Drahozal & Rutledge, supra n. 138 at 1155 (to reason that "any dispute" would sweep in disputes being arbitrated on a class basis "does not satisfy *Stolt-Nielsen,"* for according to that case "a general arbitration clause . . . does not authorize class arbitration because class arbitration differs too much from individual arbitration"; the authors do not, however, address the possible relevance to this question of any party 'stipulation' regarding a 'lack of agreement"); Rau, *Arbitral Power and the Limits of Contract*, supra n. 100 at 460 ("the mere failure to locate any 'stipulation' with respect to 'silence' (coupled with the canonical 'broad' clause) is unlikely to provide any stable equilibrium for understanding and applying the Court's holding"; "the text alone, even in the absence of any 'stipulation,' will not be adequate to justify an order of classwide proceedings"); Jock v. Sterling Jewelers, Inc., 725 F. Supp. 2d 444, 449 (S.D.N.Y. 2010)(Rakoff, J.)(after all, "the clauses at issue in *Stolt-Nielsen* contained similarly broad wording"; "at most the record supports a finding that the agreements do not *preclude* class arbitration, but under *Stolt-Nielsen,* this is not enough"), ***rev'd***, 646 F.3d 113 (2nd Cir. 2011); Reed v. Fla. Metropolitan University, Inc., 681 F.3d 630, 642 (5th Cir. 2012)(the "any dispute" clause "is a standard provision that may be found, in one form or another, in many arbitration agreements," and "merely reflects an agreement between the parties to arbitrate their disputes").

Professor Park was somewhat more prescient; see 5(5) Global Arbitration Rev. 33, 34 (2010)(since the *Stolt-Nielsen* holding "was based" on a supposed "stipulation"---but since "in the future [no] party in the position of AnimalFeeds [is] going to agree to" such a thing--- then despite the case we may in fact even see classwide arbitration "increase in the US.").

[180] Memorandum and Order, Sutter v. Oxford Health Plans, Inc., AAA 18-193-20593-02 (Sept. 23, 2003).

The arbitrator found that the clause I quoted above was not even "ambiguous"—but that "on its face" it "expresses the parties' intent that class action arbitration can be maintained." The award authorizing classwide proceedings was confirmed by the lower courts.

Now if I were a "liberal" member of the Supreme Court, eager to preserve the possibility of classwide proceedings in contracts of adhesion against the encroachments of a neo-liberal majority, I would certainly have voted to grant a writ of certiorari and accept review of this case.[181] For the Court had in fact painted itself into a difficult corner in *Stolt-Nielsen:* Surely it could not have been envisaged that federal courts were now to go wholesale into the business of second-guessing awards---spinning out a jurisprudence aimed at developing detailed legal standards intended to govern arbitral construction of contracts---monitoring how arbitral tribunals are expected to deal with the problem of "silence"?

Still, *Oxford Health* itself was not perhaps the vehicle in which the Court could best announce its intention to back away from such an enterprise. For the award in fact was facially preposterous. Consider the wonderfully brazen sleight-of-hand in this arbitral "syllogism":

a. "No civil action" "must mean "no civil action of any kind whatsoever."
b. To say that "all such disputes shall be submitted" to arbitration means that the clause sends to arbitration "all such disputes which . . . could have been brought in the form of any conceivable civil action."
c. "Since there can be no dispute in any court without a civil action of some sort, the disputes that the clause sends to arbitration are the same universal class of disputes the clause prohibits as civil actions before any court."
d. "A class action is plainly one of the possible forms of civil action that could be brought in a court."
e. "Therefore [sic], because all that is prohibited by the first part of the clause is vested in arbitration by its second part, I find that the arbitration clause must have been intended to authorize class actions in arbitration."

Q.E.D.

In addition, said the arbitrator, any conclusion to the contrary would mean that a class action, prohibited in litigation by the first phrase of the clause, could not be brought in arbitration under the second---leading to the result that class actions would not be "possible in any forum"--- a "bizarre result" that could not have been intended in the absence of some "clear expression."[182]

It is, I hope, obvious that "reasoning" of this sort---had it been indulged in by a district judge---would never have been tolerated by a hierarchically superior court. Naturally I recognize that the standard on review of an arbitral award is not and should

[181] The votes of only four members of the nine-member Court are necessary for the writ to be granted.
[182] Memorandum and Order, supra n. 180 at *18-*19.

not be in any way comparable, and I am hardly suggesting the contrary---but surely noting this fact should give us some insight into just what it is that we mean by "the process of engaging in interpretation"? It is rather hard to escape the conclusion that all the preceding rigmarole was little more than pretextual---the thinnest "textual" veneer applied to an outcome-driven award.[183]

- Although the arbitrator claimed to believe that this arbitration clause was "much broader even than the usual arbitration clause," it reads to me pretty much like the most conventional of boilerplate: "No civil action" means nothing more than this---that no party is allowed to institute a lawsuit on a matter "arising under the Agreement," but must instead go to arbitration---a provision that is actually relatively narrow, as these things go, and a conclusion that was in any event not contested. Is the arbitrator's "reasoning" really any different from inferring an agreement to classwide proceedings "solely from the fact of the parties' agreement to arbitrate"?[184]

- And to find that it would be "bizarre" to read the contract so as to completely foreclose the possibility of classwide proceedings, is either

    - grotesquely naïve---after all that's rather the point, isn't it?

    - a reversal of the federal default rule imposed by *Stolt-Nielsen*, or

    - a policy decision on an issue of "unconscionability."

  Or, perhaps, all three.

Nevertheless the Court unanimously affirmed: The opinion by Justice Kagan consisted of little but a single litany: The award may have been in "grave error," may have been "mistaken,"[185] but it holds nevertheless, "however good, bad, or ugly," as long as the arbitrator had not "strayed from his delegated task of interpreting a contract"---as long, that is, as he stopped short of what *Stolt-Nielsen* had expressly proscribed. And here the award revealed that he had indeed "focused on the arbitration clause's text," and his "decisions" were, "through and through, interpretations of the parties' agreement."

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[183] Allowing for the hyperbole of adversarial argument, counsel for the respondents in *Oxford Health* was nevertheless on to something when he characterized the award as "a ruse," "a "cover up," dissembling," "post hoc rationalization," "pretense," and "pretext." .See Oxford Health Plans LLC v. Sutter, Brief [by Respondent] in Opposition to Writ of Certiorari, 2012 WL 5838439at *18-*19.

[184] See text accompanying nn. 170-71 supra; see also Rau, *Arbitral Power and the Limits of Contract*, supra n. 100 at 460 fn. 89 ("not indeed from 'the mere fact of an agreement to arbitrate,' for that would be expressly proscribed by *Stolt-Nielsen* ---but apparently from the next best thing (and functionally identical to it)---the terms of a boilerplate 'broad' clause").

[185] Oxford Health Plans LLC v. Sutter, 2013 WL 2459522 (U.S.) at *4-*5.

The *New Yorker* used to run a recurring column headed, "Department of Understatement."

A rather curious concurring opinion by Justice Alito warned nevertheless that even should a class be certified, the *absent* members of the putative class might not be bound by the arbitrator's ultimate resolution of the dispute because unlike the named members, they had "never conceded" that the contract authorizes him to make the class determination in the first place.[186] The point of this concurrence is superficially difficult to understand[187] and, if taken uncritically and at face value, can readily lend itself to misunderstanding[188]---but there is in fact much less here than meets the eye.[189]

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[186] Id. at *7 ("the absent members of the plaintiff class have not submitted themselves to this arbitrator's authority in any way"; in consequence "it is far from clear that they will be bound"---indeed "it is difficult to see how an arbitrator's decision to conduct class proceedings could bind absent class members who have not authorized the arbitrator to decide" on a classwide procedure).

[187] *All class members, absent or present*, signed "materially identical" arbitration agreements that provided for arbitration *under AAA rules*. Under these rules, as we have seen, agreeing to arbitration "pursuant to any of the rules of the AAA" means that "the Supplementary Rules for Class Arbitration" "apply" wherever a dispute is submitted on behalf of a purported class, and in such a case, the arbitrator is empowered to 'determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause," whether the clause permits the arbitration to proceed on behalf of the class. That's what happened. So how can it be plausibly, sensibly, said that "absent" members "didn't consent to this exercise of authority"?

[188] See, e.g., Linda Mullenix, *The Court's 2012 Class Act: A Little Bit of This, a Little Bit of That,* 40:8 Preview of United States Supreme Court Cases 328, 332 (Aug. 10, 2013)(Justice Alito "oddly sounded a precautionary note protective of absent class members").

[189] Nobody seems to have talked about this, although Justice Alito asked a question to the same effect (and without getting much of an answer) in oral argument. Oral Argument, supra n. 177, 2013 WL 1193215 *35-*40. He speaks as if some principle of general application is involved, but the apparent explanation is far less interesting and of limited significance:

The arbitrator's clause construction award---in which he decided that the agreement did indeed authorize classwide proceedings---was dated September 23, 2003, and so the arbitration had presumably been initiated some time prior to that. But the AAA's rules for class arbitrations were promulgated only on *October 8, 2003*, as a "supplement" to the other rules. And the Commercial Arbitration Rules (presumably otherwise applicable) provide that "these rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a Demand for Arbitration or Submission Agreement received by the AAA." R. 1(a)(version in effect as of July 1, 2003, but the current rules are identical). So the Supplementary Class Rules, with their express delegation of decisionmaking power to the arbitral tribunal, were for this reason presumably not applicable to the *Oxford Health* arbitration.

Thus Justice Alito's point is an extremely narrow one:

a. While the AAA's "Supplementary Class Rules" may not have governed the *Oxford Health* arbitration, they will of course apply *in any AAA arbitration that will have been initiated later*, even only a few weeks later--- on the (generous) assumption, that is, that the drafting party has not insisted by contract on a bilateral arbitration. Cf. President & Fellows of Harvard College v. JSC Surgutneftegaz, Partial Final Award on Clause Construction (AAA 11-168-T-01654-04, Aug. 1, 2007) at *7 fn. 5 ("the Supplementary Rules became effective about eight months before this arbitration was commenced"; "since the AAA rules apply here . . . the Supplementary Rules also apply").
b. If one assumes that the "express delegation" in the AAA rules do not apply to bind the absent class members in *Oxford Health*, then the only thing that could possibly bind them is the *Bazzle*-plurality-presumption that under a "broad" clause this question (a question of "what sort of proceeding has been agreed to") falls to the arbitral tribunal for decision. If Justice Alito reasoned this far, then for him to assert that they will nevertheless not be

Now given the obvious defects in the *Oxford Health* award---in which the Court readily acquiesced---it might well be wondered what has become of the federal "default rule" so critical to *Stolt-Nielsen. (*This default rule, as we remember, was imposed there by the Court on an arbitral tribunal that was not even allowed to inquire into the text of an agreement conceded to be "silent."). It would certainly have been consistent with the thrust of *Stolt-Nielsen* to say---even in the absence of any "stipulation"---that at the very least, a thumb is to be placed on the scales. Surely, once the Court rests an argument on the assertion that classwide proceedings would necessarily "*change the fundamental nature of arbitration"*---once it claims that such proceedings were so far outside the scope of the probable expectation of the contracting parties, that arbitrators should not have taken it upon themselves to order such proceedings in the absence of some indicia of consent---it would seem to be inviting some requirement of explicit statement.[190] But we gather from *Oxford Health* that while arbitrators are still presumably bound to place the burden of proof on the proponent of any agreement, the *Stolt-Nielsen* "default rule" doesn't have much more sting than that: It does not function like the presumption of arbitrability---it does not even function as a rule of "clear statement" like the fraught and hollow *First Options* requirement of the "clear and unmistakable" [191]---it is far more easily overcome.

This is not to say that there is nothing of *Stolt-Nielsen* that remains: The holding could perhaps still linger as at least a warning shot across the bow---requiring arbitrators henceforth to think twice, and deeply, and work strenuously, at justifying any construction that would favor

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bound, is necessarily to assert that *Bazzle* has not survived. Indeed, in his concurrence he invokes the critical language in *Stolt-Nielsen* to this effect, remarking that "if we were reviewing the arbitrator's interpretation of the contract *de novo*, we would have little trouble concluding that he improperly inferred "[a]n implicit agreement to authorize class-action arbitration . . . from the fact of the parties' agreement to arbitrate." See my discussion of this language at text accompanying n. 170 supra. That this aspect of *Bazzle* has not survived is thus consistent with my reading of *Stolt-Nielsen.* To the extent that the Court purports to leave open the question whether "the availability of class arbitration is a so-called 'question of arbitrability,'" 2013 WL at *4 fn.2, the only explanation is unseemly coyness.

[190] On "changing the nature of arbitration," see text accompanying nn. 163-64 supra.

On the inference of a heightened standard of proof, see Oral Argument, supra n. 177, 2013 WL 1193215 at *5, *15-*16 (counsel for respondent: "we are asking that that generally applicable standard of review be applied to a question with a very strong empirical presumption that the FAA has attached to it"; "what you held in *Stolt-Nielsen* was not simply that parties who have stipulated can't be forced into class arbitration. What you held was that you cannot have class arbitration in the absence of affirmative agreement that is not evidenced by an all-disputes clause; and . . . that background---that strong presumption must as a matter of Federal law inform the arbitrator's decision"). See also Rau, *Arbitral Power and the Limits of Contract*, supra n. 100 at 477 ("at the very least, the proponent will now need to make a strong affirmative showing---a showing (in text or context) that this was in fact the intention of the contracting parties---in order to overcome the contrary presumption. The formula that such a showing must be 'clear and unmistakable'---not being used so much anymore elsewhere---will presumably be available, and would certainly be consistent with the spirit of Justice Alito's opinion").

[191] See Rau, *Arbitrating "Arbitrability"*' supra n. 56 ("On the 'Clear and Unmistakable': 'This is All One Big Overblown Latke'").

classwide proceedings. For a while that is precisely the effect it had on the more earnest arbitrators who were gamely trying to follow along with the twists and turns of Supreme Court jurisprudence[192]---and it may still serve that function for those arbitrators who are less inclined towards nullification.

But a glance at the arbitral caselaw in the wake of *Oxford* Health certainly suggests that arbitrators are finding very little difficulty in scooping up something more than "silence" to throw in the eyes of potential reviewing courts. Between the date that *Oxford Health* was decided and the date this is being written (May 6, 2014), AAA arbitrators issued 22 "clause construction awards." *In 16*, the arbitrator found that classwide proceedings had indeed been agreed upon by the parties[193]---and in most of these, the putative "interpretative path" was one that would

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[192] See, e.g., Rivera v. Sequoia Education, Inc., Award on Motion to Reconsider Clause Construction Award, AAA 11-434-1075-08 (Sept. 22, 2011)(in 2009 the arbitrator determined that the agreement "permitted class arbitration based upon applicable California law"; however, *Stolt-Nielsen,* decided subsequently, "has caused me to conclude that where an arbitration agreement . . . does not explicitly contain language permitting class arbitration, class arbitration is not permitted"; both *Stolt-Nielsen* and C*oncepcion* make clear that "class arbitration is so fundamental a structural shift that it is not to be ordered in the absence of an express and explicit agreement"); Maslo v. Oak Pointe Country Club, Inc., AAA 11-181-02243-06, Amended Clause Construction Award (June 15, 2010)(in 2007 the arbitrator rendered a Clause Construction Award finding that the agreements "permit the action to proceed as a class"; however, *Stolt-Nielsen* "compels a reconsideration" of this award; Justice Breyer's dissent, concluding that the majority opinion was "establishing an affirmative-authorization requirement in contracts for class arbitrations," allows us "to determine the full impact" of the case; "being unable to presume [an] intent [to "affirmatively agree to class arbitration"] from the broad language of the arbitration clause," "the reasoning set forth in the original Clause Construction Award is no longer tenable as a matter of law and must be reversed").

I do not know if these cases are still pending or if yet another motion could now be entertained to reconsider, yet again, in light of *Oxford Health.*

[193] This is however a somewhat less positive track record than the outcomes in the arbitral caselaw in the years *prior* to S*tolt Nielsen*: According to the AAA, in the first six years that the AAA's Class Rules were in effect, 135 clause construction awards were rendered, and of these only 5% held that "the arbitration clause did not permit the arbitration to proceed on behalf of a class"). Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., Brief of AAA as Amicus Curiae in Support of Neither Party, 2009 WL 2896309 at *9.

Still, a success rate for classwide construction of 73% is not unimpressive. Might it be said that a tribunal's decision to 'construe" an agreement so as to permit classwide proceedings is likely to be skewed by the nature of arbitral incentives? The reader may possibly think so, although I couldn't possibly comment.

Typical of the exceptions in the post-*Oxford Health* period is Alam v. Charter College, LLC, AAA 73 160 00378 12 (Sept. 26, 2013). In this barely reasoned award the arbitrator noted simply that "the relevant language of the arbitration clause in this case is substantially the same as the contractual language" in *Stolt-Nielsen,* and that "there is no dispute that the parties in this case, like those in *Stolt-Nielsen,* have come to 'no agreement.'" It is not precisely clear on what the "no agreement" conclusion was based---the claimants did after all argue that "there was no way for [them] to have known that their agreement to the language 'all disputes' would not include class claims," and I take this to be an interpretive argument based on their apparent intention. Still, the proponents of classwide proceedings had equally argued the interpretive point in *Stolt-Nielsen* itself, see text accompanying nn. 89-92 supra, and so the award seem faithful enough to Supreme Court authority.

make a first year law student blush: I do not know if he awards are truly disingenuous, but they are by and large (in Judge Posner's term) "wacky."[194]

For the moment, the principal "interpretative techniques" *du jour* appear to be:

- reliance on the generic "broad" arbitration clause" (i.e., precisely the same clause that was in issue in *Stolt-Nielsen* itself);[195]

- reliance on the very fact of "silence"---apparently deploying a presumption to the effect that the mere failure to address the matter in the contract implies the parties' willingness to arbitrate on a classwide basis (i.e., a discredited interpretation of *Bazzle* itself and a move explicitly foreclosed by *Stolt-Nielsen*)[196];

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[194] See *Wise v. Wachovia Securities*, supra n. 142 (Posner, J.); cf. Tice v. American Airlines, Inc., 373 F.3d 851, 854 (7th Cir. 2004)(Posner, J.)("As long as what the arbitrators did can fairly be described as interpretation, our hands are tied").

[195] See, e.g., Partial Final Clause Construction Award, Harding v. Midsouth Bank, N.A., AAA 69-516-Y-00219-12 (Aug. 29, 2013)(language requiring the arbitration of "any controversy or claim . . . that arises out of or relates to this agreement" permits arbitration of the class-action claims; "the word 'claim' clearly includes class claims"; "the word 'controversy' is even broader than the word 'claim'" and the word "any "is the "broadest possible modifier that could have been chosen, and leaves no doubt that the clause was intended to cover representative claims"); Clause Construction Award, Betts v. Fastfunding The Company, Inc., AAA 33-516-00012-13 (Aug. 21, 2013)("the 'broad' arbitration clause language leads the arbitrator to the conclusion that the Agreement was intended by the parties to operate as a plenary diversion of all disputes between them 'arising from or relating to' the Transactions to arbitration"; "under the plain language of the Agreement" "the parties agreed to submit all disputes to arbitration, including claims for class relief"); Clause Construction Award, Maldonado v. Callahan's Express Delivery, Inc., AAA 33-523-00375-13 (April 18, 2014)("This clause is not silent. It requires arbitration of any and all disputes 'arising under this agreement'"; "there is no 'limiting language' in this contract or clause and the Parties are bound by their own words").

See also n. 179 supra; Oral Argument, *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.,* 2009 WL 4662509 at *36: (Justice Scalia: "so the only language you can point to is . . . that 'any dispute' language?"; "you are hanging . . . your whole assertion that these arbitrators . . . found that the contract positively authorized class action, upon that language"?).

[196] On *Bazzle,* see text accompanying nn. 54-67 supra; on *Stolt-Nielsen,* cf. 130 S. Ct. at 1776 ("the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings").

But nevertheless, see, e.g., Clause Construction Award, Gonzales v. Brand Energy & Infrastructure Services, Inc., AAA 70-160-000270-13 (Oct. 15, 2013)(same arbitrator as in *Betts,* supra n. 195; "there is no suggestion [in the agreement] of any truncation in arbitration of procedural devices or substantive rights available in court"; the agreement's "silence in regard to what [the respondent] now asserts the parties intended to foreclose is deafening in context," and the fact that the agreement "does not hint that [classwide] procedures are foreclosed strongly suggests that under the terms of the agreement, the parties intended that they be available in arbitration"); Clause Construction Award, Grande v. Lawrence Recruiting Specialists Inc., AAA 57-160-00080-13 (December 20, 2013) ("LRS could have made this interpretive task easy by inserting or amending this contract and clause to preclude class arbitration by using clear language," but "did not avail itself of this opportunity"; *Stolt-Nielsen* "was a signal that if a Party to a contract wanted to avoid class arbitration they [sic] could write a clause precluding class arbitration"; the case "gave employers an open invitation to write contracts that would clearly

- reliance on the clearly noninterpretive canon *contra proferentem*[197] , and, most commonly,

- reliance on a variety of supposedly "textual" elements which, however ingenious, appear from out of deep left field and are unqualifiedly irrelevant.[198]

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foreclose class arbitrations"). Apparently, then, the "interpretive basis" for classwide proceedings here is to be found in the drafting party's very failure to exclude them.

A variation on the "presumption from silence"---equally making something out of nothing, equally reversing the default rule of *Stolt-Nielsen*---can be found in the occasional recourse to the canon *expressio unius. S*ee, e.g., Clause Construction Award, Guzman v. AIMCO River Club, LLC, AAA 18-526-Y-000120-13 (Dec. 4, 2013)(the agreement "provides a 'carve out' for certain actions the parties intended not to be arbitrable" [such as actions for eviction or to collect past due rent]; "having turned its attention to enumerating the various claims, actions, and proceedings to be excluded, the Landlord certainly could have added class arbitration claims or proceedings to the list of excluded claims. It did not," and this then is "more than 'mere silence'"); cf. Partial Final Clause Construction Award, Benson v. CSA-Credit Solutions of America, Inc., AAA 11-160-M-02281-08 (July 6, 2010)(since the parties had ruled out arbitration for *trade secret disputes*, they "knew how to exclude certain disputes from the scope of the arbitration agreement, but apparently chose not to exclude collective and class arbitrations"---despite the fact that it was "not uncommon" for other parties to do so in other agreements).

[197] See, e.g., Partial Final Clause Construction Award of Arbitrator, Price v. NCR Corp., AAA 51-160-908-12 (Oct. 24, 2013)("the Agreement was entirely drafted by Respondent and presented to Claimant as a condition of his being hired without opportunity for negotiation. As such, it is a contract of adhesion and must be construed against the draftsman"). On *contra proferentem,* see text accompanying nn. 154-158 supra.

[198] See, e.g.,

- *Grande,* supra n. 196. Here the clause required arbitration of "any claim or controversy between the parties to this Agreement which arises out of or relates to the Agreement*, the business of the Company*, [Employee's] employment with Company, or any other relationship between [Employee] and the Company"; for the arbitrator, "*surely*" this language empowers the employee to bring claims that "[raise] questions about a pattern or practice by which the business of the company is conducted," a category "broad enough to involve more than one employee where that claim questions a pattern or practice of the business". As I tell students, "surely"---like underlining and raising one's voice---is usually a bad sign in an argument. *Quaere* whether a) the scope of the substantive claims that are stipulated to be "arbitrable" is really the same question as b) the identity of the parties to the proceeding.

- Partial Final Clause Construction Award, Kissel v. Sirius XM Radio Inc., AAA 13-516-00198-13 (Dec. 6, 2013). Here the clause called for arbitration "if we cannot resolve a Claim informally, including any claim between us, and any claim by any of us against any agent, employee, successor, or assign of the other, *including, to the full extent permitted by applicable law, third-parties who are not a party to this Agreement*"; for the arbitrator, the italicized language was "broad enough to contemplate incorporating class claims into the arbitration clause." *Quaere* though whether the italicized language, plainly subject to the word "against," does anything more than extend the benefit of the arbitration clause to potential defendants. Precisely the same move---and the same error--- is regularly found in other recent awards, e.g., Partial Final Award on Clause Construction, Cordova v. United Education Institute, AAA 73-516-Y-000065-13 (Aug. 21, 2013)(respondent "inserted language extending the student's obligation to arbitrate any 'controversy' or 'claim' the student might have *against any of a laundry list of other persons and entities affiliated with [respondent*,] all of whom are non-signatories" to the agreement; given the extension of the agreement "for the benefit of a broad range of persons and entitles related to [the respondent], the reasonable expectation of [claimants] . . . is that there

Other moves, equally unprincipled, have something of a history but do not seem for the moment to have reappeared in the recent arbitral case-law---doubtless they are being held in reserve. For example: In purporting to assess the "intentions" of contracting parties, might it perhaps be relevant to point to the fact that class actions happen to be commonplace in cognate litigation---say in employment discrimination claims?[199] Might the prevalence of class litigation, then---given its comforting familiarity---bespeak the acceptability of the mechanism of aggregation---and thus give us some assurance that it was within the expectation of the contracting parties---at the same time permitting arbitrators to bootstrap themselves into a desirable job?[200] ("Or might it rather represent *the precise motivation for the parties' desire to avoid it*, through an "escape into arbitration?")[201]

IV. Some Conclusions

What, then, are we to make of this dizzying series of twists and turns? Where has the Supreme Court left us in our attempt to assess the power of arbitral tribunals to "fill gaps" in apparently "silent" agreements? One may well be forgiven for thinking that the result-oriented "reading" indulged in by the arbitrator in *Oxford Health*---in which the Court apparently saw itself obligated to acquiesce--- has set courts on the path of leaving future arbitrators quite at

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would likewise [sic] be class arbitration of claims such as those they seek to raise on behalf of other students").

- Partial Final Clause Construction Award, McCullough v. Terminal Trucking Co., LLC, AAA 31-160-00371-12 (Sept. 17, 2013)(under the AAA Employment Rules the "arbitrator may grant any remedy or relief that would have been available to the parties had the matter been heard in court"; the arbitrator reasoned that if the Worker Adjustment and Retraining Notification Act "expressly allows an individual in court to seek a statutory remedy and relief on behalf of himself and other employees . . . does it not follow that he has authority to do the same in this arbitration?" *Quaere* though whether even in employment cases, the federal procedural rules for aggregate litigation can fairly be deemed to amount to delegated "remedies." *Quaere* also whether characterizing a classwide proceeding in this way---as "the same remedy" that would be available in a court of law---can truly be deemed an "interpretive" move---as opposed to a surreptitious policy judgment to the effect that any holding to the contrary would be "unconscionable" as against "public policy."

[199] See United Airlines, Inc. v. McDonald, 432 U.S. 385, 394 n.13 (1977) ("Title VII actions are by their very nature class complaints").

[200] For the argument that this is relevant to an arbitral determination, cf. Whitehill, *supra* note 89, at 14-15 (imagine a price-fixing claim arising from a commercial supply contract "with the same broad arbitration agreement"; since "class action antitrust suits invariably follow the related criminal proceedings," "it could fairly be argued that the parties understood that an antitrust class arbitration of that type could arise and be covered by" the agreement); Smith & Wollensky Restaurant Group, Inc. v. Passow, 831 F.Supp.2d 390 (D. Mass. 2011)(arbitrator noted that "wage and hour claims like those in play here are frequently pursued as class or collective actions, and both [parties] must be deemed to understand that"; in consequence classwide arbitration was "contemplated and permitted by the agreement," and the arbitrator subsequently "affirmed [his] initial Clause Construction Award as consistent with *Stolt-Nielsen";* held, award was "the result of a reasonable interpretation" of the agreement).

[201] Rau, *Arbitral Power and the Limits of Contract,* supra n. 100 at 459 fn. 85.

large. Has the Supreme Court then just climbed all the way up the hill in *Stolt-Nielsen* just to placidly walk down it again a year or two later?

A number of things, though, can be asserted with at least some degree of confidence.

1. The results reached by the tribunal in *Oxford Health*---and by most tribunals in succeeding cases---seem to be perfectly in line with the expansive "gap filling" authority that I have argued earlier should be presumptively attributed to arbitrators. This is at least as broad as---and indeed considerably exceeds---the authority that a "common-law court" is assumed to possess. After all, the power that an arbitral tribunal may be given

- to supply the appropriate default rule---whether a "majoritarian" rule that purports to "mimic" the parties' hypothetical bargain or to track their tacit assumptions---or a rule "crafted, more simply and directly, in overt response to concerns of efficiency and fair play"[202]---

is not, when you come to think about it, fundamentally different from

- the power given to an "interest" arbitrator to determine what "contract rights ought to be"---at least to the extent he defines his task as an inquiry into what the parties "should, by negotiation, have agreed upon": "What should the parties themselves, as reasonable men, have voluntarily agreed to?"[203]

But however the cases should be characterized, at least one thing seems clear: Even a cursory look at the current state of arbitral jurisprudence makes it impossible to believe that the outcomes at which tribunals are arriving are truly the results of exercises in anything like "textual interpretation": To accept such a proposition amounts to nothing but willful blindness, the technique of Nelson at Copenhagen.

2. The Court's refusal in *Stolt- Nielsen* to allow arbitrators themselves to devise appropriate default rules in the absence of some demonstrable "agreement," may perhaps have rested on considerations peculiar to classwide proceedings---concerns that seemed to justify the intrusion of some supervening federal common-law default rule that arbitrators are bound to respect. But whether in that context or otherwise, there is inherent in the Court's opinion a vision of arbitral adjudication that is cramped indeed---and which in consequence creates obvious incentives for private decisionmakers to be somewhat less than candid with respect to the true rationale of their awards, in the interest of avoiding the risk of vacatur. This cabined

[202] See the discussion at text accompanying nn. 112-116 supra.
[203] Twin City Rapid Transit Co., 7 Lab. Arb. 845 (1947)(collective bargaining agreement provided that "if at the end of any contract year the parties are unable to agree upon the terms of a renewal contract, the matter shall be submitted to arbitration"). See the discussion at text accompanying nn. 23-36 supra.

view of what is permissible (a "contractual basis") and what is not ("sound policy") promotes disingenuousness and so denatures the arbitral task, which---*precisely as is true for state tribunals themselves*---should embrace both.[204]

3. Of course, *Oxford Health* suggests that the prevailing standard of review will be easy enough for any but the most unwary, clumsy, or naïve of arbitrators to satisfy: In some jurisdictions we already see *Stolt-Nielsen's* intrusive insistence on "interpretation*"* reformulated, so that nothing more is required than that a court assure itself that it "cannot *say with certainty* that the *arbitrator's own words demonstrate* that he failed to interpret the [agreement]."[205] And at least with respect to classwide proceedings, drafting parties can be counted on---with the Court's blessing---increasingly to create a "new normal" by drafting around---forestalling---the foreseeable propensities of arbitrators to parrot the *Oxford Health* analysis.[206]

4. I suggested earlier that it simply will not do to try to demarcate the "gap filling" authority of arbitrators by purporting to distinguish between their power to "determine existing rights," and their inability to 'create new obligations": This, as I said--- nothing especially original here---is essentially question-begging, involves characterization after the fact, and really is little more than rhetoric.[207] More fundamentally, Lon Fuller's seminal work reminds us that this common

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[204] A point I have been making throughout; see, e.g., text accompanying nn. 25-31, 36-41, and n. 136 supra.

[205] Archer-Daniels-Midland Co. v. Paillardon, 944 F. Supp.2d 636, 645 (C.D. Ill. 2013)(a very easy case, however, in which the losing respondent claimed that the arbitrator had "exceeded his authority" by concluding that it had breached the agreement because the agreement "did not require it to make sales through the joint venture"---something that indicated that the award was "not based on the contract but rather the Arbitrator's "own sense of equity").

[206] Allowing a drafting party to prevent such nominal exercises in "interpretation"---through a contractual provision that bars classwide proceedings outright---was a move sanctioned by the Court in *AT&T Mobility, LLC*, supra n. 161 (upheld against state challenges on the ground of "unconscionability"); and in American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013) (upheld against federal challenges on the ground that a classwide proceeding was necessary to effectively "vindicate" plaintiff's rights under the antitrust laws); see generally Rau, *Arbitral Power and the Limits of Contract*, supra n. 100 at 523ff.

A recent study by the Consumer Financial Protection Bureau of the use of pre-dispute arbitration provisions in contracts for consumer financial services (essentially consumer checking accounts and credit cards), concluded that

- larger banks tend to include arbitration clauses in their checking contracts, while mid-sized and smaller banks and credit unions do not----so that around 8% of banks---but covering 44% of insured deposits---include such clauses in their contracts;
- similarly, larger bank issuers of credit cards are more likely to include arbitration clauses than smaller bank issuers---so that around 17% of credit card contracts---but covering over 50% of credit card loans outstanding---are subject to such clauses.

"Almost all of the arbitration clauses studied contained terms limiting class proceedings"; the "handful of clauses that did not . . . tended to be from very small institutions."
CFPB, Arbitration Study Preliminary Results (Dec. 12, 2013).

[207] See text accompanying nn. 34-41 supra.

Cf. Kröll, supra n. 24 at p. 12. Here Dr. Kröll gives an account of the frequent objections made to the "gap-filling power of the arbitrator"---summarizing arguments to the effect that the arbitrator's task is normally restricted to the determination of "pre-existing rights"--- but that when arbitrators engage in gap filing in the sense

assumption---that it is the "proper province" of courts and arbitrators, the proper "limits of adjudication," solely to make *authoritative determinations of "claims of right*"---is at bottom nothing but circular: For "it is not so much that adjudicators decide only issues presented by claims of right or accusations. The point is rather that *whatever* they decide, or *whatever* is submitted to them for decision, tends" by the institutional framework in which they function "to be converted into a claim of right or an accusation of fault."[208]

So, for example, in the case of unforeseen events having arisen in the course of a long-term relationship, to raise before the arbitral tribunal

- a claim of "excuse" grounded in doctrines of "mistake" or "impracticability"---and equally,
- a claim for readjustment and reformation of the transaction---

are both claims that might be justified as appeals to "*work out all the implications of the parties' original deal*"---to consider the nature of their expectations, the objectives they were seeking to advance, thus the "sense of the transaction." This is true *without regard to how they are characterized*[209]---and *without regard to whether they are ultimately found to have any merit*.[210] Wisdom and power are not after all synonymous.[211]

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of "adding provisions to the contract at their discretion," they instead "take up the creative task of rule-making . . . and create at their discretion new obligations for the parties which did not exist before their intervention, not even in a hidden form." But it is striking that so often, and with but a little ingenuity, much that is latent, or lurking beneath the surface, or inherent in the structure, of a cooperative venture can be teased into "existence"---revealing implications to be explored and possible ways of giving effect to the parties' original objectives. And in the same vein see the highly convincing demonstration in Markovits, supra n. 5 at 703. Here Professor Markovits discusses the leading case of *Joseph Martin, Jr. Delicatessen, Inc*., supra n. 19---in which the court refused to enforce a renewal term in a commercial lease by which, after an initial five-year term, the annual rentals were "to be agreed upon." He points out that over the course of the initial term the "the shopping habits and travel patterns" of the tenant's customers likely "made its business much more valuable in its current location than in any other"; conversely, for the landlord, this "developed customer base made the site more valuable when occupied by the existing firm than it would be when occupied by any other." In consequence both parties had "a great deal to gain from maintaining their relationship"---and "insofar as the parties could have anticipated this contingency when they signed their initial lease, they had good reason . . . to allow a third party to divide the gains from their co-dependence between them, and hence relieve them of the transaction costs that any negotiated solution would impose on them."

[208] Fuller, supra n. 31 at 368-69.

[209] An employee's demand for a raise, if made not to his boss but before an arbitrator, would have to be supported "by a principle of some kind, and a demand supported by principle is the same thing as a claim of right." Id. at 369.("he may argue the fairness of the principle of equal treatment and call attention to the fact that Joe, who is no better than he, recently got a raise").

[210] Cf. Aluminum Co. of Amer. v. Essex Group, Inc., 499 F.Supp. 53 (W.D. Pa. 1980). Under the parties' contract, Essex was to supply ALCOA with alumina which ALCOA would then convert by a smelting process into molten aluminum, which Essex in turn would pick up for further processing. The contract contained an escalation formula, designed with the aid of Alan Greenspan, by which the price paid to ALCOA would vary with changes in the Wholesale Price Index; by this means ALCOA sought to achieve "a stable net income of about $.04 per pound of

5. If there is any limiting principle to an arbitrator's adjudicative authority, it may be one that Fuller himself suggested---cases where the ethic of reasoned argument no longer has any purchase at all---cases where the objectives of an enterprise would not be served if it were to

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aluminum converted," with a "range of foreseeable deviation [of] roughly $.03." But ALCOA claimed that in the period following execution of the contract, its production costs (mostly the cost of electricity) had risen greatly "beyond the foreseeable limits of risk" under the contract's index formula, and it sought relief under the Contract-law doctrines of "impracticability and frustration of purpose." The court held for ALCOA---and what is particularly interesting, the relief it granted took the form of "reformation or equitable adjustment" or "equitable modification" of the contract. The price calculation derived from the contract was to be "changed" according to a formula devised by the court itself in order to "reduce ALCOA's disappointment to the limit of risk the parties expected in making the contract"--- Essex was thus to pay prices that would ensure to ALCOA for all the aluminum it delivered a profit of $.01 per pound. Merely to decree rescission would be "to grant ALCOA a windfall gain in the current aluminum market"; "a remedy modifying the price term of the contract in light of the circumstances which upset the price formula will better preserve the purposes and expectations of the parties." In a learned "Appendix" the court surveyed the remedies resorted to by courts in other legal systems "when beset with contracts that are no longer deemed 'fair' in light of changed circumstances," and observed that the prevailing approaches were to "try to establish the original economic position and intent of the parties; to try to distribute the consequences of the unforeseen burden equally between the parties; [or to] try to determine what the parties would have agreed to had they been aware of what was going to happen."

Note that I am certainly making no claim that the *ALCOA* case was "correctly decided" under US law----for it has always been much criticized and remains very much an outlier. (Professor Dawson has described the decision there as"bizarre," and "a lonely monument on a bleak landscape," John P. Dawson, Judicial Revision of Frustrated Contracts: The United States, 64 B.U.L. Rev. 1, 28, 35 (1984)). Nor is there any reason why the choice posed to an adjudicator must be (as the court in *ALCOA* seemed to assume) binary; for intermediate and provisional positions are conceivable: For example, the adjudicator might encourage the parties to salvage the transaction themselves by providing them an interlude for renegotiation, and then by saying, should a reasonable offer of modification have been rejected, "you *should* have accepted this reasonable proposal, so we will treat you as though you did." Cf. id. at 29-30. Nor, finally, am I making any claim whatever to the effect that an arbitrator in all these cases will be expected to proceed in precisely the same way, regardless of whether he is asked

- to devise a remedy for an alleged breach,
- to make the "yes/no" decision of
  - excuse that justifies rescission as opposed to
  - plenary enforcement, or instead
- to undertake to readjust the terms of a transaction in light of changed circumstances.

The point being made is infinitely simpler: It is just that the question under the applicable law of the "*merits*" of reformation, like the merits of excuse, is *not at all the same thing as the question of arbitral authority.*

Under German law, cf. Markesinis, supra n. 24 at 336 (doctrine of the "disturbance of the foundation of the transaction" in German law; in the case of a "very exceptional transformation of circumstances," courts are not limited to terminating the contractual relationship, "but will adjust it," substituting new terms, at least if :"both parties wish to continue with the contractual relationship"); Dawson, supra at 2 (a "preferred" solution at least if the court-ordered revision will produce "an imitation 'contract' that the parties could perform and that would bear a recognizable resemblance to the transaction it replaced").

[211] See text accompanying n. 111 supra, and n. 210 supra. If, as St. Paul writes in Corinthians, "all things are lawful," "not all things are expedient. All things are lawful, but not all things edify."

I believe Professor Berger makes a similar point in Berger, supra n. 38 at 1353, 1380 ("international arbitrators are . . . extremely reticent when it comes to varying contracts without a specific contractual basis"; contract adaptation and renegotiation are essentially "consensual procedures" in which "legal arguments, positions and principles mostly fade into the background"; "these sorts of complex processes are not compatible with the one-sided imposition of an adjustment by a neutral third party").

be organized at the outset around the notion of formally defined rights. The canonical examples are those problems that he called "polycentric" (or "many-centered"): A bequest to two museums of paintings "in equal shares," for example, or the assignment to a particular position of players on a football team, may lie outside the province of adjudication because any particular choice (the disposition of a single painting, the shift of any one player) will necessarily have implications and repercussions for all the others: Here the task of the judge---or arbitrator---would require him to coordinate "mutually interacting variables"; "the only way to solve the problem is to take account of all the variables at once, in other words, to consider the situation as a whole."[212] The case then doesn't call for a decision of "yes" or "no," or even "more" or "less," but the available solutions are "scattered in an irregular pattern across a checkerboard of possibilities."[213]

In such cases, Fuller suggests, an optimal solution can only be arrived at by vesting the decisionmaker, whoever he is, with the power of "managerial direction."[214]

Now: Such power is not inevitably and in all cases outside the realm of private ordering: At least I know of no policy---nothing other than a rigid and a priori insistence on what "arbitration" necessarily "is"---that would place it irrevocably beyond the pale. With a small amount of research one can readily find cases where "arbitrators" have been entrusted with the open-ended task of exercising business judgment in the running of a collaborative venture.[215] But here---and only here---we are so far from the modal adjudication in terms of

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[212] See Robert G. Bone, Lon Fuller's Theory of Adjudication and the False Dichotomy between Dispute Resolution and Public Law Models of Litigation, 75 B.U. L. Rev. 1273, 1314 (1995).

[213] See Lon Fuller, *Collective Bargaining and the Arbitrator*, Proceedings, 15th Annual Meeting, National Academy of Arbitrators 8 (1962).

Professor Eisenberg would add another category of cases in which adjudication might not be appropriate---cases where decisions cannot be reached through an application of authoritative standards, that is, where among multiple possible criteria for decision, "no criterion would be authoritative in the sense that it would trump other criteria, or even in the sense that it carried an objective weight in relation to others. One football coach may legitimately emphasize one kind of ability, a second another kind, and a third experience." Melvin Aron Eisenberg, Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller, 92 Harv. L. Rev. 410, 424-25 (1978). This is a subtly different analysis from Fuller's: Unlike selection of players on a football team, for example, choosing members of *a college golf team* "may involve multiple criteria but not polycentricity, because golf is played on an individual basis and selection of the team therefore entails little or no interaction between choices." Id.

[214] Fuller, supra n. 31 at 398 ("the manner in which managerial direction solves polycentric problems is exemplified by the baseball manager who assigns his players to their positions, decides when to take a pitcher out, when and whom to pinch-hit, when and how far to shift the infield and outfield for a particular batter, etc.").

[215] See, e.g., Ringling v. Ringling Bros. Barnum & Bailey Combined Shows, Inc., 49 A.2d 603, 605 (Del. Ch. 1946), modified, 53 A.2d 441 (Del. 1947): Here shareholders agreed to "consult and confer" with each other and to "act jointly" in exercising their voting rights, and that if they failed to agree, the disagreement would be submitted to arbitration "to the end of assuring... good management"; the court held the agreement enforceable. The rationale contains much rich irony and somehow manages to get things completely backward: State law at the time did not provide for the specific enforcement of arbitration agreements, but the court conveniently concluded that this agreement "does not possess the characteristics which go to make up an arbitration

what is expected of parties by way of proof and reasoned argument,[216] that a court will naturally require a certain level of specificity and explicit contractual direction before subjecting the parties to any arbitration regime. And putative arbitrators will equally shrink from construing the agreement so as to give them that role.

Agreement" since the "so-called arbitrator is not called upon to resolve a conflict which would otherwise be decided by a court."

See also Vogel v. Lewis, 268 N.Y.S.2d 237 (App. Div. 1966), aff'd, 224 N.E.2d 738 (N.Y. 1967): Here an agreement between the two owners of a close corporation provided that "in the event of a dispute, or difference, arising between them in the course of their transaction with each other," the dispute would be settled by arbitration; the court held that a dispute over whether the company should exercise an option to purchase the warehouse where the business was carried on, was arbitrable The precise legal issue posed was somewhat different from what we have been discussing---it was whether the agreement violated the state Business Corporation Law requiring that a corporation "shall be managed by its Board of Directors "---but the court held that there was "no reason why arbitrators may not be useful in resolving issues which involve *some business judgment* so long as they are not required to assume a *continuing burden of management*." And, inter alia, see Application of DeCaro, 25 N.Y.S.2d 849 (App. Div. 1941)("the chief controversy submitted for arbitration related to the management of the business of a corporation"; the "arbitrators applied the only feasible remedy to a situation which, if continued, would have ruined the business of the corporation, and acted well within their powers").

Some years ago, among various "hypotheticals "to "illustrate the use of arbitration to fill 'gaps' in long-term international commercial transactions," Howard Holtzmann posed the case of a joint venture agreement under which disagreements between the owners "on such matters as the amount to be spent for advertising, or the choice of the managing director, or whether [the company] should pay a dividend rather than keeping the money to finance its future growth," was to be resolved by arbitration. He concluded that at least in the US "the use of arbitration for this purpose is well recognized." Howard Holtzmann, *Powers of Arbitrators Under United States Law to Fill "Gaps" Arising Under Long-Term Commercial Contracts, in* Proceedings, supra n. 25 at CIVh1, CIVh10.

[216] "An adjudicative board might well undertake to allocate one thousand tons of coal among three claimants; it could hardly conduct even the simplest coal-mining enterprise by the forms of adjudication." Fuller, supra n. 31 at 371.